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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA AND
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, National Cable Television Association, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 21, 1972.

OPINION BELOW

The opinion of the Court of Appeals is reported at 464 F. 2d 1313 (1972) and appears in the Appendix. (App.A).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 21, 1972. A petition for rehearing was denied on October 2, 1972 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's CATV regulatory scheme confers "value to the recipient" as required by Title V of the Independent Office Appropriation Act, in order to justify an annual fee on the CATV industry.

2. Whether the Commission may recover the full cost of its regulation of the CATV industry where the fees are unrelated to specific services performed by the Commission.

STATUTES INVOLVED

1. Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. §483 (a):

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he

shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts. . . . .

MISCELLANEOUS

2. Bureau of the Budget Circular No. A-25 of September 23, 1959 (App. C).

3. Report and Order in Docket 18802, In the Matter of Amendment of Subpart G of Part 1 of the Commission's Rules relating to fees, 23 FCC 2d 880 (1970), and Memorandum Opinion and Order denying reconsideration, 28 FCC 2d 139 (1971). (App. B)

STATEMENT OF THE CASE

This petition seeks review of the decision of the Court of Appeals holding

that the annual fee for CATV systems imposed by the Federal Communications Commission is a reasonable exercise of the authority delegated to the Commission by Congress.

On February 19, 1970, the Commission released a Notice of Proposed Rulemaking in Docket No. 18802, 21 F.C.C. 2d 502 (1970), in which it proposed to radically revise its then existing fee schedule.1/

The Notice of Proposed Rulemaking

1/ The Commission had adopted rules in its Report and Order in Docket 14507, 25 R.R. 1559 (1963), providing for a schedule of filing fees which became effective on March 17, 1964. The fees established therein were limited to charges established for voluntary filing of applications for television and radio stations, common carriers, safety and special services, and commercial and amateur radio licensing. They amounted to approximately 25 percent of the Commission's budget.

stated that the new fee schedule was based upon "the direct and indirect cost to the Government" of the work and services performed by the Commission; upon the "'value to the recipient' of the privileges granted" by the Commission; as well as the "public policy or interest served."2/

2/ These are the legal criteria for determining agency fees as contained in Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. §483 (a). This law, not the Communications Act of 1934, provides the statutory authorization for the promulgation of schedules of fees by an agency. Acting under the provisions of the Appropriation Act, the Bureau of the Budget issued its Circular No. A-25 on November 5, 1953, which directed agencies to establish policies to "provide a system of fair and equitable fees which, taking account of the value to the recipient and the public policy and interest served, shall recover, to the full extent possible, the aggregate cost incurred in the conduct of these activities." S. Report 1467, 84th Cong. 2nd Sess. 7 (1956). The Bureau of the Budget revised Circular No. A-25 on September 23, 1959 (App. C).

The Commission admitted the newness of its approach, stating, 21 F.C.C. 2d 502, 503-504 (1970):

> The fee schedule being proposed herein represents a departure from the existing schedule in several major respects. The present schedule is limited to nominal fees upon the filing of applications for various types of authorizations for radio stations, operators' licenses, and communications common carriers. The approach in the newly proposed fee schedule, in addition to imposing fees in various areas where none now exist, is more closely and literally tied to the criteria stated in the above-cited Appropriation Act. Thus, the proposed fees are designed to make the Commission. . . . . "self-sustaining to the full extent possible. . . . . " in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. (Emphasis added)

The Commission's Notice of Proposed Rulemaking went on to state that its schedule of fees would include CATV systems, not previously subject to federal fees. The Commission argued that CATV systems

"are the subject of Commission regulation and which directly or indirectly receive what in effect is a Commission authorization tantamount to a "license"." Id. at 504.

The CATV parties commenting on the Commission's Notice of Proposed Rulemaking emphasized that the Commission's proposals did not properly consider the absence of "value to the recipient" in developing the principle of annual CATV fees.

The Commission then issued its Report and Order on July 1, 1970, 23 FCC 2d 880 (App. B).

The Commission's schedule of fees (47 C.F.R. §§1.1101-1.1120) established the following general categories: First, the fees previously in effect under the Commission's Report and Order in Docket 14507, supra, for filing applications for

radio stations, radio operator licenses or common carrier activities, were generally increased; second, a new charge was levied for grants of broadcast license applications in addition to the filing fee; third, an annual charge was imposed upon broadcast stations and common carriers. Finally, a schedule of fees for CATV operators was imposed, namely, filing fees in connection with notices filed by CATV systems regarding the carriage of television stations, and petitions filed by CATV systems seeking the waiver of or relief from Commission regulations; and, in addition, an annual charge on all CATV systems calculated at the rate of 30 cents per individual subscriber.3/

3/ This fee would rise to 40 cents per subscriber under a new fee schedule proposed by the Commission on December 13 (Public Notice, December 15).

This new fee schedule differs significantly from the Commission's prior fee schedule and the fees adopted are clearly calculated to permit the Commission to sustain its entire annual budgetary request.

Under these new rules, CATV systems pay an annual fee of 30 cents per subscriber. Based on the Commission's estimate of 3,750,000 subscribers in the CATV industry at that time, the annual fee payments were expected to recover $1,125,000.4/ The Commission filing fees would recover about $25,000. Total fees from CATV would amount to $1,150,000. The effective date of both the filing and annual CATV fees was set at August 1, 1970. Under Section 1.1116,

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4/ There are now almost 6,000,000 cable subscribers.

47 C.F.R. §1.116, all applications, petitions and notices received on and after August 1, 1970, were subject to the new fees.

In the Report and Order of July 1, 1970, and the Memorandum Opinion and Order of April 1, 1971, 28 F.C.C. 2d 139, denying reconsideration of the CATV fee schedule, the Commission rejected all arguments against the principle of the annual CATV fee. The Commission's schedule of CATV fees, with two exceptions, remained identical to those set forth in the Notice of Proposed Rule Making. The modifications made were adverse to the industry. The Commission changed one special filing fee and eliminated the exemption of small CATV systems from the annual fee.5/

5/ The Notice of Proposed Rulemaking had provided for an exemption from the annual fee of systems under 200 subscribers.

The Notice of Proposed Rulemaking and the Report and Order variously refer to different bases and approaches used by the Commission in considering "value to the recipient". The Commission admitted that "the factors we have used may not wholly or precisely reflect 'value to the recipient'." (App. B-6) The problem is not the precision of the Commission's rationale but rather the Commission's failure to formulate any clear statement of the facts actually used to determine "value" to the CATV industry.

With the first annual fee payment by CATV systems due on May 1, 1971, NCTA, on April 20, 1971, filed a Petition for Stay with the Commission, pointing out the lack of a refund provision, and requested the Commission to stay payment of the annual fees by CATV systems until the validity of

the CATV fee schedule was decided. The Motion was denied by Memorandum Opinion and Order in Docket 18802, (FCC 71-481) on April 30, 1971.

NCTA, along with several other interested parties, appealed the Commission's decision. All of the appeals were consolidated in the United States Court of Appeals for the Fifth Circuit. In a decision rendered on July 21, 1972, that court upheld the Commission in all respects (App.A). With particular reference to the imposition of an annual fee on CATV systems, the court concluded that CATV operators benefit differently than the public at large from the Commission's regulation of CATV (App. A-18).

NCTA's petition for rehearing was denied on October 2, 1972. (App.A-22)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS AS TO THE PROPER INTERPRETATION OF TITLE V OF THE INDEPENDENT OFFICES APPROPRIATION ACT.

Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. §483 (a) (1971) (hereinafter "Appropriation Act"), authorizes the head of each federal agency to prescribe a "fee, charge or price" for "any work, service,. . . benefit,. . . franchise, license, permit, certificate. . . or similar thing of value" granted by any federal agency, which must be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served. . . ."

The critical concept, which has been the subject of differing judicial

interpretations, is the term "value to the recipient". Executive standards and guidelines for application of Title V are set forth by the Bureau of the Budget in Budget Circular No. A-25, dated September 23, 1959 (App. C) (hereinafter "Circular"). In that document, the Bureau stated that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." (App. C-2) The document goes on to say that these services include agency action which "provides special benefits. . .above and beyond those which accrue to the public at large." (App. C-2) Finally, the Circular notes that no charge should be levied for services rendered "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as

benefitting broadly the general public." (App. C-3)

With these guidelines at hand, the Fifth Circuit upheld the Commission's fee schedule for CATV, and found that under the Commission's regulatory scheme CATV operators have received "special benefits" sufficient to justify the imposition of the $ .30 per subscriber annual fee. In so holding, the Court conceded that the Commission does not issue licenses for CATV systems, but that CATV operators have directly benefited from the Commission's various regulations "designed to keep entry into the industry open". (App. A-17) As examples, the Court cited Commission rules prohibiting various forms of cross-ownership. Another example the Court gave was the rule (at the time proposed) limiting the amount of franchise fees local governments could

charge cable operators. Finally, the Court pointed out that "the entire regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators." (App.A-17) 6/

6/ CATV operators are not licensed by the Commission. Their basic operating authority is contained in franchises which are received from local municipalities and/or state regulatory bodies. Up until 1972, some two years after the subject fee schedule was adopted, the Commission's regulation of CATV consisted entirely of a set of restrictions, e.g., cross-ownership bars; signal carriage limitations; non-duplication of network programming. A new set of rules was adopted on February 3, 1972. Cable Television Report and Order, 36 FCC 2d 143 (1972). Under these rules, new CATV systems must obtain a certificate of compliance from the Commission before they can commence operations. But basic operating authority still comes first from the local franchise, and then the Commission looks over the proposed operation solely for consistency with the Commission's rules. In any event, this certification requirement comes two years after the fee schedule took effect.

This interpretation of "value to the recipient" directly conflicts with that of the United States Court of Appeals for the District of Columbia Circuit in New England Power Company et al, v. Federal Power Commission, Case No's 71-1439, 71-1539, 71-1555. (App. D) In that case representatives of the natural gas pipeline and electric industry petitioned the Court to review and set aside revised fee schedules established by the Federal Power Commission for the filing of applications under the Natural Gas Act and the Federal Power Act, and also imposing annual assessments to cover the costs of administering these programs. The Court held that the Federal Power Commission lacked the statutory authority to act and the fee schedule was set aside.

In New England Power Company, supra,

the Federal Power Commission had devised formulae for assessing annual charges against jurisdictional companies to recover the costs of regulating those companies. The plan called for the FPC to determine the administrative costs of the programs and then to subtract the revenues raised from flat filing fees. The resultant net cost was then to be assessed annually against each company in proportion to the amount of jurisdictional gas deliveries (or power sold) by the company as a ratio of the total jurisdictional gas deliveries (or power sold) by all utilities. The factual analogy to the annual CATV fees is quite clear. The authority relied upon by the FPC was the same as that relied upon by the FCC--the Appropriation Act.

The FPC, in defending its fee schedule, contended that its charges come within the Circular's terms because the charge related

to the cost incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and while such regulation "has provided continuing benefits to consumers," it has also:

> [R]edounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. (App. D-8)

The Court in New England Power Company completely rejected this argument. It noted that the creation of an "economic climate" is not a special service nor is a particular company the "special beneficiary" of such a climate any more than any other company or the consumer in general. The

Court went on to say that:

> [U]nder the Commission's order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. In effect then, the contemplated charges would have no relation to specific services or benefits rendered. The Commission must then fall back upon its 'economic climate' argument which is obviously an overly broad benefit particularly in light of the requirement that the charges be for a 'measurable unit of service'. Furthermore, the statutory language---'to or for any person'---as well as the Budget Circular require an identifiable recipient. The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. This assumption is erroneous in that in any given year some companies may require substantial services from the Commission while others may neither require nor desire them. (Emphasis added) (App. D-8)

The Court concluded that the regulation of the gasoline and power companies was primarily for the benefit of the public, and therefore that:

> There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission

> must benefit the public. In the absence of Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. (Emphasis added) (App. D-9)

Thus, the conflict in the decisions is both clear and direct since the CATV operators are in the same posture as the gas and power companies. In both cases, the regulatory agencies calculated the annual direct and indirect costs of regulating the subject industries, subtracted the sums collected from filing fees, and devised a method of collecting the remainder annually from all members of the industry. In both cases the method devised bore no relationship to specific services or benefits rendered. In fact, both methods were based on economic criteria; for gas and power companies, the amount of gas delivered or

power sold was the criterion; for CATV systems, the number of subscribers. Further, in both cases the beneficiaries of regulation are obscure and the service can be primarily considered as broadly benefitting the general public. In addition, the gas and power companies receive their organic operating authorization from the agency whereas CATV operators do not. Finally, the D.C. Circuit completely rejected the "economic climate" argument while the Fifth Circuit clearly adopted it. In sum, the Fifth Circuit and the D.C. Circuit have interpreted the Appropriation Act standard of "value to the recipient" quite differently under analogous factual situations. Without guidance from this Court, federal agencies will not know the circumstances under which annual assessments may properly be levied. National policy requires a uniform standard, which only

the Supreme Court can supply.7/

This conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISION BELOW ENLARGES THE POWER OF FEDERAL AGENCIES TO ASSESS FEES CONTRARY TO CONGRESSIONAL INTENT

The legislative history of the Appropriation Act evidences that the Congress did not intend to confer upon the Commission the power to levy tribute on persons who were simply subject to its jurisdiction. Under the Appropriation Act, the fees to be charged, if any, are conditioned on their being something of "value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . .to or for any person . . . ." The House Appropriations Committee in reporting the Appropriation Act stated that the motivation for authorizing

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7/ The FPC has asked this Court for an extension of time in which to file a petition for certiorari in New England Power Company, supra.

federal agency fees resulted from the fact that the government "is not receiving full return from many of the services which it renders to special beneficiaries" (Emphasis added). H. R. Rept. 384, Committee on Appropriations, 82nd Cong., 1st Sess. (1951). The Senate imposed the same guidelines, S. Rept. 2120, Committee on Expenditures in the Executive Department, 81st. Cong., 2nd Sess. (1950). The legislative history makes the clear distinction between services which accrue to such special interests, and services the benefits of which inure to the public and for which the Government assumes the

cost.8/

It is clear from the regulatory history of CATV that FCC regulations have not been designed to "benefit" cable interests. On the contrary, the basis for Commission jurisdiction has been the potential economic impact of CATV technology on other broadcast media, and this has been used to justify the Commission's "ancillary" regulation of CATV. United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). The Fifth Circuit's list of "valuable benefits" that the industry

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8/ Congress was careful to make the critical distinction between a "fee"and a "tax". A fee bears a reasonable relationship to the extent and nature of services rendered and the benefits received beyond those received by the public generally. Hanson v. Griffith, 204 Misc. 736, 124 N.Y.S. 2d 473 (1953); Smith v. Carbon County, 90 Utah 560, 63 P. 2d 259, 262 (1936). Statutory and regulatory authority permit the imposition of fees, not taxes.

has received misses the point entirely. All of these regulations were clearly enacted to benefit the public, not the CATV industry as special beneficiaries. See Report and Order in Docket No. 18509, 21 FCC 2d 307 (1970); Report and Order in Docket No. 18397A, 23 FCC 2d 816 (1970). Furthermore, regulations designed to keep "entry into the industry open" are not "measurable units of service" benefitting a specific company as required by the Circular. This characterization of the regulations is analogous to the "economic climate" argument put forth by the Federal Power Commission and rejected by the D. C. Circuit.

The Fifth Circuit also noted that the question was not whether the industry agreed with the regulations but whether the industry benefited in a manner different from the public at large. The Court cited the scarcity

of television outlets which exists under the Commission's broadcast regulations and which creates much of the economic value attached to distant signals imported by CATV. Here the Court has concluded that "benefits" flow to the CATV industry as a result of its broadcast regulation. The latter is even further removed from the direct connection required by the Appropriation Act and is not what the CATV industry is allegedly paying for, i.e., CATV regulation from which it receives direct benefits. Any benefit the CATV industry receives from the Commission's regulation of broadcasting is purely derivative and incidental, thus clearly insufficient as a basis for imposing fees. This is the vital distinction between the broadcast regulatory scheme and the CATV regulatory scheme. In addition, broadcasters receive a valuable monopoly from the Commission in the form of a license, without

which they cannot go into business.9/

It is important to note that it is only the annual assessment which is under attack, not the fees for the filing of applications, jurisdiction for which the Commission undoubtedly has under Aeronautical Radio, Inc. v. U. S. 335 F. 2d 304 (7th Cir. 1964), cert denied, 379 U. S. 966 (1965). Where an application or pleading is involved, the fee is directly related to a voluntary act. Here the additional annual charges arise out of no voluntary action initiated by the charged company. In fact, as in New England Power Company, supra, a company would have to pay

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9/ Even a licensed entity must receive a "benefit" in connection with a fee. The annual fees overturned in New England Power Company, supra, were being levied against licensed entities, but the Court's reversal was based on the lack of a "benefit".

despite the fact that they had no proceedings before the Commission that year. It is submitted that the lack of a relationship between services rendered and annual assessment is fatal to the Commission's fee schedule and goes beyond the Congressional mandate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1621

CLAY BROADCASTING CORPORATION OF TEXAS,
Petitioner,

versus

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

No. 71-1990

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order of the Federal Communications Commission (Texas Case)

(July 21, 1972)

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

GEWIN, Circuit Judge: These consolidated petitions for review seek to set aside the revised schedule of fees of the Federal Communications Commission which became effective August 1, 1970.[1] The petitioners are representatives of the broadcasting and cable television industries and include several individuals and corporations which have interests in particular broadcast properties. While the contentions of the several parties vary widely the petitioners collectively present a broad challenge to the Commission's authority and the reasonableness of its order imposing the fees adopted July 1, 1970, *Schedule of Fees*, 23 F.C.C.2d 880, 35 Fed. Reg. 10988. Upon review we find that the revised fee schedule is a reasonable exercise of the authority delegated to the Commission by Congress.

The concept of user charges was explicitly authorized by Congress in Title V of the Independent Offices Appropriation Act of 1952.[2] The Federal Com-

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[1] This Court has jurisdiction to review the Commission's order under 47 U.S.C. § 402(a) and 5 U.S.C. § 701 et. seq.

[2] "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any persons (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as

munications Commission adopted its first fee schedule in 1963 covering all areas of Commission regulation at the time. Report and Order, *Fees*, 34 F.C.C. 811 (1963). That schedule was challenged before the Seventh Circuit Court of Appeals, which affirmed the Commission's order, *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). Shortly thereafter the Commission announced a policy of keeping its fees schedule under continuing review. See *Fees*, 1 F.C.C.2d 1349 (1965).

On February 18, 1970, the Commission issued a Notice of Proposed Rule Making looking towards the broad revision of its fee schedule. *Schedule of Fees*, Docket No. 18802, 21 F.C.C.2d 502, 35 Fed. Reg. 3815 (1970). The Commission noted that Congress had urged that the activities of the Commission become more nearly self-sustaining and proposed a new schedule of fees which would generate estimated fees approximating the Commission's budgetary request for fiscal year 1971. These fees included increases in those areas which were already subject to at least nominal fees and proposed new fees in areas where the Commission had only recently exercised jurisdiction to regulate —

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the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy, or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts. . ."

31 U.S.C. § 483a (1971).

community antenna television (CATV) and radio frequency equipment testing and approval.

In addition to levying application fees, the Commission proposed to give explicit recognition to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license.[2] The Commission proposed fees for the grant of applications for assignment of a license or a transfer of interest in a broadcast station which reflected the value which the parties to the transaction placed on the sale. It also proposed an annual fee for broadcast stations based on the licensees' own commercial rates. In the CATV field the Commission proposed to tie the annual fee to the number of subscribers in each system.

After receiving a large number of comments from interested parties, the Commission adopted the revised Schedule of Fees on July 1, 1970. The document was

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[2] "... [T]he proposed fees are designed to make the Commission '* * * self-sustaining to the full extent possible * * *' in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the 'value to the recipient' of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government. Therefore, in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, the new fee schedule adopts the concept of a separate fee reflecting our consideration of the 'value to the recipient' factor involved in authorizations and licenses."
21 F.C.C.2d at 503-04 (1970).

officially released on July 2, 1970, *Schedule of Fees*, 23 F.C.C.2d 880, and was printed in the July 8, 1970 issue of the Federal Register, 35 Fed. Reg. 10988. As indicated in the earlier Notice of Proposed Rule Making[4] the revision abolished broadcast license renewal fees in favor of annual operating fees which amounted to 24 times a radio station's highest one-minute spot announcement rate, but not less than $52, and 12 times a television station's highest 30-second spot announcement rate, but not less than $144. The assignment and transfer fee to be paid immediately following the consummation of the transfer was set at 2% of the consideration paid. The new schedule was to be effective August 1, 1970 on all grants made on or after that date. The Commission however excepted from the grant fees those applications filed prior to July 1, 1970, the date of the adoption of the new schedule. The Commission levied an annual fee on CATV systems equal to $0.30 multiplied by the number of subscribers of the system.

Thereafter a number of petitions for reconsideration were filed with the Commission concerning various aspects of its fee schedule. These petitions, in so far as they are material to this case, were subsequently denied, 28 F.C.C.2d 139 (1971). All petitions for review of the Commission's fee schedule rulings, filed pursuant to 47 U.S.C. 402(a) in this and other circuits, have been transferred to this court and consolidated in this case. We consider each of the challenged fees in turn.

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[4] 21 F.C.C.2d at 507 (1970).

I. *Broadcast Annual License Fee*

The National Association of Broadcasters (NAB), a national trade organization with a substantial number of radio and television station members, seeks a review of both the annual license fee and the 2% grant fee on assignment and transfer applications. The NAB contends that the annual fee is in effect a discriminatory tax on radio and television. It acknowledges that the Commission may impose fees upon the broadcast services and that the Commission is not limited to the imposition of nominal fees only. However the NAB contends this annual license fee is unreasonable because it reflects that the Commission's concern was only with recovering the full amount of the agency's appropriation. This, it contends, violates the statutory guidelines provided in the act which authorizes agency fees[8] that are "fair and equitable" taking into account: (1) the cost to the Government; (2) the value to the recipient; and (3) the public policy or interest served. It argues that not all of the Commission's activities in the broadcast section are of specific benefit to the stations. The Commission and the stations themselves expend a significant amount of time and effort in activities which serve the general public at large. But the NAB complains, "the fact is the schedule of fees for the broadcast services hands to commercial licensees *all* of the costs of commission activities in the broadcast field when in fact all of the services are *not* rendered for the benefit of commercial licensees."

In our judgment the NAB misconstrues the legal requirements which the Commission must meet in im-

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[8] 31 U.S.C. § 483a. *See* note 2 *supra*.

posing fees and we believe that its position demonstrates a myopic misconception of the "benefits" which the Commission confers on commercial licensees. In the first instance, the weighing of these statutory factors or "whether * * * all * * * must play a quantitative share" in the judgment made, was for the Commission. *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304, 309 (7th Cir. 1964) *citing Secretary of Agriculture v. Central Refining Roig Co.*, 338 U.S. 604, 611, 612, 94 L.Ed. 381, 388, 389, 70 S.Ct. 403, 407 (1950). Additionally Bureau of the Budget Circular A-25 which provides "The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient" does not compel the Commission to precisely pro-rate its costs in performing the various services in the Broadcast Bureau and limit the fee for each service to its precise administrative cost.[6] Indeed such precision would be difficult if not altogether impossible to achieve.[7]

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[6] We find no merit in the NAB's contention that these fees are in reality an unlawful tax because the money involved is not approximately equal to the *amount of work* rendered by the Commission in behalf of the party against whom the charge is made. The Commission is clearly entitled to charge such fees to recover its costs as are fair considering the value to the recipient, public policy and other pertinent facts. 31 U.S.C. § 483a. By the very terms of the statute "value to the recipient" is not limited to the amount of work performed but also includes any "... service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility. . ." *Id.*

[7] E.g., processing an application for increase in a station's power would appear to be a cost properly chargeable to both the applying station for expansion of its signal contour, and to those stations which might receive interference from the power increase for the protection of their signal contours.

The record indicates that the Commission estimated the direct and indirect costs of regulating the broadcast industry to be $9,661,200 or 38.8% of the Commission's fiscal year 1971 budget. 23 F.C.C. 2d at 882. After giving consideration to the other factors,[a] the Commission settled on a schedule in which the broadcast fees were estimated to produce $9,600,000. That figure represented less than 0.3% of the approximately $3.5 billion gross revenues generated by the broadcast industry in 1968. In exchange, commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. We therefore are unable to find that the Commission acted unreasonably or arbitrarily in imposing on commercial licensees an annual fee which is part of a schedule calculated to fully recover the direct and indirect costs of regulating the broadcast industry.[b]

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[a] I.e., the "value to the recipient" and "public policy" factors. 23 F.C.C.2d at 882.

[b] We also find no merit to the NAB's contention that the Commission's fees are improper because they fail to take into consideration the large number of unprofitable stations. In the response to the petitions for reconsideration the Commission noted:

> "The Commission is keenly aware of the significant number of unprofitable broadcast stations and of the contention that the annual operating fees would cause a diminution of program services by broadcast stations, particularly in the marginal and unprofitable stations. We would emphasize, however, that no evi-

II. *Two Percent Grant Fee*

The NAB and a number of individuals with particular broadcast interests[10] also challenge the imposition of a fee of 2% of the consideration paid following consummation of the assignment of a license or transfer of control as approved by the Commission. 23 F.C.C.2d at 903. We find no merit to the NAB's contention that the 2% figure is arbitrary or unfair because it does not precisely reflect the different amounts of effort the Commission expends in considering the applications of varying complexity.[11] Furthermore, we are unable to accept its argument that the amount paid solely reflects the transferors' assets and good will,

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dence has been submitted in support of these assertions, and that since all broadcast licensees have established financial qualifications sufficient to carry on their broadcast operations, it is highly unlikely that the new fee schedule would constitute a significant burden in a broadcast station's total operation. * * * The Commission will, of course, maintain a continuing review in this area, and if the facts indicate a change is necessary, appropriate revisions will be made. Meanwhile, any broadcast licensee whose financial situation is such that the annual operating fees will cause a diminution of program service to the public, or otherwise materially affect his operation, may petition the Commission for a waiver of the annual operating fee for a given period, and show good cause for relief requested." 28 F.C.C.2d 143 (1971).

[10] Clay Broadcasting Corporation of Texas; WBLI, Inc.; Dorothy Meythaler, Executrix of the Estate [Last Will and Testament] of Merlin J. Meythaler and Merton J. Gonstead d/b/a Livingston County Broadcasting Company and Dorothy Meythaler and Merton J. Gonstead d/b/a Pontiac FM Broadcasting Company; Steuben Broadcasters, Inc.; Forward Communications Corporation.

[11] See f.n. 6, *supra*.

or its inference that the Commission has already been compensated by the fee paid when the application for transfer was filed for any work performed for the transferee.

In transferring the license the Commission is granting to the transferee a privilege similar to the grant of a construction permit for a new station. In considering the value of the transfer the Commission noted "unlike construction permits, which often involve competitive applications and comparative hearings and which simply authorize a new station of undetermined profitability, assignments of license and transfers of control are insulated from competition and concern a going business whose profitability is reflected in a judgment by the parties who have reached agreement on the price to be paid." 21 F.C.C.2d at 506-07. Given this explicit consideration of the "value of the benefit conferred" with the cost to the government and public policy involved we are not persuaded that a grant fee measured by 2% of the consideration paid is unreasonable.

A more serious question is presented by the individual petitioners with respect to the time schedule adopted by the Commission for the institution of these grant fees. In the schedule the Commission set an "effective" date of August 1, 1970, after which the grant fees would be imposed. However the Commission exempted from this fee those applications granted after August 1, 1970 but which were filed with the Commission prior to July 1, 1970. Two of the individual petitioners, Meythaler and Steuben, filed applications on July 1 and 2, 1970, but prior to the public announcement that the new fee

schedule had been adopted and that it would apply to the grant of their applications. Essentially they contend that they relied on the prior fee schedule in negotiating their contracts and that the new rule has the effect of retroactively applying the grant fee to them.

The remaining petitioners, Clay, Forward and WBLI, all filed applications for transfer or assignment during July 1970 but after the Commission had published the new schedule. These petitioners contend that notwithstanding the Commission's assignment of August 1, 1970 as the "effective" date, the real "impact" date was July 1, 1970. They therefore argue: (1) the commission erred in distinguishing the filing date from the "effective" date; (2) the Commission violated the Administrative Procedure Act[12] and its own rules[13] in providing no notice or less than 30 days notice prior to the "effective" date of the rule; and (3) that once the Commission decided to afford an exemption for some applications on file prior to the effective date it could not lawfully exclude July filed applications from this exception. Although we might well have done otherwise if the question was ours to decide in the first instance, we can not find that the Commission's chosen "effective" date and its exemption are arbitrary, unreasonable or unlawful.

Despite arguments to the contrary we are not convinced that the grant fee is being applied retroactively to applications filed in July. The fee is not automatically imposed on all filed applications for assignment or

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[12] 5 U.S.C. § 553(d) (1971).
[13] 47 C.F.R. § 1.427 (1971).

transfer. The 2% fee is charged only after the Commission has processed the application and decided to grant the transfer or assignment. Even then the fee is not required unless and until the consummation of the assignment because of the uncertainties of the date of closing and other factors.[14] The closing of the transfer or assignment following Commission approval is an event of sufficient independence from the mere filing of the application that the imposition of a fee upon transfers to be made in the future is not a retroactive fee upon those applications already on file but not yet granted. Thus we are unable to conclude that the Commission acted arbitrarily in using the date of grant for the "effective" date of the fee instead of the date of filing. *See Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220, 227 (D.C. Cir. 1967).

In the Commission's Report and Order adopting the new fees it stated that the fees were being made "effective" on August 1, 1970, although it was aware that 30 days' official notice by publication in the Federal Register was not possible.[15] The Commission noted that it believed that good cause existed for an August 1, 1970, effective date citing three factors: (1) widespread notice in fact would be provided affected parties; (2) a first of the month effective date was required for administrative pro-ration of yearly fees; and (3) that in accordance with Congressional directives the Commission wanted the fee schedule to cover as much of fiscal 1971 as reasonably possible. We find that the Commission's statement of "good cause" suf-

[14] 23 F.C.C.2d at 888.
[15] 23 F.C.C.2d at 885.

ficiently meets the requirements of both the Administrative Procedure Act and the Commission's rules.; *See Buckeye Cablevision, Inc.*, 387 F.2d at 228 n. 34; *cf. Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297, 312 (E.D. N.Y. 1971).

We are also not convinced that the Commission either was required to include or was unreasonable in excluding July filed applications for transfer or assignment from the exception to the grant fee afforded applications filed prior to July 1, 1970. There is something arbitrary about the drawing of any administrative line. To some extent whether a line appears to be "reasonable" to a party depends upon which side of the line the party falls. The difficulty in drawing fair and reasonable lines in the communication industries is considerably exacerbated by the rapid technical and economic expansion of the various media. *E.g., Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220 (D.C. Cir. 1967) ['Grandfather clause' permitted systems carrying distant signals before the regulations were announced to continue to do so]; *Kessler v. F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963) ['Freeze' on new station applications effective when announced although applications then on file would be processed].

In the present case the Communications Act has a built in 30 day holding period on applications for assignment or transfer before the Commission may grant them.[16] In excepting those applications already on file by July 1, 1970, the Commission excluded from the grant fee those applications which it had the authority

[16] 47 U.S.C. § 309(b) (1971).

to grant prior to the August 1, 1970 effective date of the fee.

In response to criticism following the adoption of the fees the Commission noted that it had established this exception in order to eliminate any claim that action on matters filed prior to the date of adoption of the new fee schedule might be delayed until on or after August 1, 1970, so as to be able to exact the new grant fees. 28 F.C.C. 139, 141 (1971). The Commission also noted that no claim of surprise as to the adoption of the new fee schedule can properly be made, since the notice of proposed rule making had been issued in February 1970, 4-1/2 months prior to July, 1970, and since the Commission's representations to the Congress that a new fee schedule would be adopted by the beginning of fiscal year 1971 had been widely reported. *Id.* As in *Kessler*, "The issue is not what we might have done ourselves or what we might think would have been more reasonable. The issue is whether what the Commission did, in the light of the reasons it gave, was unreasonable and capricious." 326 F.2d at 686. Here, as in *Kessler*, we cannot conclude that it was.

III. *Annual Fee for CATV*

The National Cable Television Association, Inc. (NCTA) and the California Community Television Association jointly challenge the portion of the Commission's fee schedule which imposes an annual fee of $30 per subscriber on all CATV systems. NCTA contends that the Commission lacks the authority to impose any sort of an annual fee in cable television, and that in any event this annual fee fails to meet the statu-

tory requirements[17] and amounts to a tax because it fails to consider the statutory element of "value to the recipient" (i.e., the CATV operators) conferred by the FCC regulation of the industry. Finally NCTA asserts that the fees charged CATV operators are based upon a miscalculation of the actual costs of regulating CATV and that the fees are disproportionately higher for CATV than for other regulated industries. We find no merit in any of these contentions.

The Commission's efforts to regulate CATV have not been consistent.[18] The new technology which made cable television possible was thought at first to fall wholly between the cracks of the Commission's statutory authority,[19] but in recent years the Commission has asserted an increasingly expansive jurisdiction over cable TV. The potential economic impact of CATV technology on other broadcast media spawned the initial regulatory efforts by the FCC.[20] This collateral impact on other regulated media has been used to justify the Commission's "ancillary" regulation of CATV. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 20 L.Ed.2d 1001, 1016 (1968).[21] In *General Tele-*

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[17] 31 U.S.C. § 483a (1971).

[18] United States v. Southwestern Cable Co., 392 U.S. at 161 to 167, 20 L.Ed.2d at 1007 to 1010. *See also*, Note, The Wire Mire: The F C C and CATV, 79 Harv. L. Rev. 366 (1965).

[19] *See*, 1959 Report and Order, 26 F.C.C. 403, 426-31.

[20] Carter Mountain Transmission Corp. v. F.C.C., 32 F.C.C. 459 (1962) *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied* 375 U.S. 951 (1963).

[21] The Court stated: "There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various

phone Co. of Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) we upheld the Commission's rules which prohibited telephone companies from furnishing CATV services in their telephone service areas and restricted their construction of cable facilities. Although the question in that case was whether the Commission had properly exercised its unquestioned authority over common carriers,[22] we recognized that the development of CATV is part of the broader purpose of the Commission under 47 U.S.C. §151.[23] 449 F.2d at 854.

Most recently the Supreme Court in *United States v. Midwest Video Corp.*, ___ U.S. ___, ___ L.Ed.2d ___, 40 L.W. 4626 (June 7, 1972), has held that the Commission has jurisdiction under 47 U.S.C. § 152(a) over CATV systems and operations which may be exercised to protect and promote the objectives for which the Commission had been assigned jurisdiction over broadcasting. ___ L.Ed.2d at ___, 40 L.W. at 4632. The court upheld the Commission's authority to require that CATV systems with more than 3,500 subscribers operate to a significant extent as a local outlet

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responsibilities for the regulation of television broadcasting . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. at 178, 20 L.Ed.2d at 1016.

[22] 47 U.S.C. § 214 (1971).

[23] "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges, . . . there is created a commission to be known as the 'Federal Communications Commission' . . ." 47 U.S.C. § 151 (1971).

by originating programing and make available facilities for local programing.

It seems apparent to this court that under the Commission's regulatory scheme which existed from the time of the adoption of these fees until the present, CATV operators have received "valuable benefits" sufficient to justify the imposition of the annual fee. Although the Commission does not issue licenses for CATV systems as it does for broadcast stations, CATV operators have directly benefited from the Commission's various regulations designed to keep entry into the industry open.[24] The Commission has also proposed rules limiting the amount of franchise fees which local governments could charge cable operators.[25] Indeed, as the Commission points out, the entire regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators.[26]

It is true that some of the Commission's direct regulation of CATV has tended to restrict cable development in order to protect other media.[27] But the inquiry

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[24]*See* General Telephone Company of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) [in which NCTA intervened in support of the Commission's regulations]. The Commission has restricted television broadcast station and translator station ownership of CATV systems in their service area, 23 F.C.C.2d 816 (1970), prohibited broadcast network ownership of cable systems, 23 F.C.C.2d 816 (1970), and proposed rules banning cross-ownership of newspapers and cable systems in the same area, 23 F.C.C.2d 833 (1970).

[25]Notice of Proposed Rule Making, *CATV*, Docket No. 18892, 25 F.C.C.2d 50, 53 (1970).

[26]Cable Television Proposals, 31 F.C.C.2d 115 (1971).

[27]E.g., Buckeye Cablevision, Inc. v. United States, 438 F.2d 948 (6th Cir. 1971).

under 31 U.S.C. 483(a) is not whether the regulated industry likes or agrees with all the regulations prescribed, but whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission. CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear the CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

We have already observed in Section I of this opinion that the statutory factors of benefit, costs and policy are for the Commission to weigh. *Aeronautical Radio, Inc.*, supra. In this instance the Commission observed:

> "47. The 30-cents-per-subscriber-annual-fee formula has been attacked on diverse grounds: that it fails to take into consideration that different systems charge different subscription rates; that operating costs vary even when subscription rates are the same; that in some cases local franchise agreements bar systems from passing increased costs on to subscribers via rate increases; and that the 30-cents-per subscriber fee would cut sharply into narrow profit margins.
>
> 48. The very diversity of these criticisms (which were not accompanied by specific sup-

porting data) suggests that it would be exceedingly difficult to devise a formula that would be proof against all attack. In defense of the formula adopted, we would note: (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual, reporting by CATV systems; and finally, (v) that as the Commission obtains such information it will use it for periodic review of the equity of its CATV fee schedule."

23 F.C.C. at 897-88 (1970).

The Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit "self-

sustaining to the full extent possible," under 31 U.S.C. 483a. Considering all factors revealed by the record the balance which the Commission struck was not unreasonable or arbitrary in our opinion. If experience shows that the Commission's fees are unfair, unworkable or have an adverse effect on competition in the CATV industry the Commission can be expected to revise them in order to meet the exigencies of the competitive situation. *General Telephone Company of the Southwest v. United States*, 449 F.2d 846, 858 (5th Cir. 1971).

For the reasons stated we find that the Commission did not exceed or abuse its statutory authority in imposing the fees contained in its July 1, 1970, Report and Order. The order of the Commission is in all respects AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1621

CLAY BROADCASTING CORPORATION OF TEXAS,

Petitioner

versus

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

No. 71-1990

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

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(October 2, 1972)

ON PETITION FOR REHEARING

Before GEWIN, AINSWORTH and SIMPSON, Circuit Jud

PER CURIAM:

IT IS ORDERED that the motion of the National Association of Broadcasters for leave to file a petition for rehearing out of time in the above causes is hereby GRANTED, but the Court does not approve of the casual manner evidenced by the actions of the Petitioner by filing its petition and brief out of time after the Court had granted it an extension of time.

IT IS FURTHER ORDERED that the petitions for rehearing filed in the above entitled and numbered causes be, and the same are hereby DENIED.

APPENDIX A-23

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1971

Your No. FCC 18802)

CLAY BROADCASTING CORPORATION OF TEXAS,
Petitioner,

versus

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

- - - - - -

Petition for Review of an Order of the Federal Communications Commission (Texas Case)

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Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the petition of Clay Broadcasting Corporation of Texas for review of an order of the Federal Communications Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Federal Communications Commission in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondents the costs on appeal to be taxed by the Clerk of this Court.

July 21, 1972

Issued as Mandate: August 14, 1972

F.C.C. 70-694

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SUBPART G OF PART 1 OF THE COMMISSION'S RULES RELATING TO THE SCHEDULE OF FEES	Docket No. 18802

REPORT AND ORDER

(Adopted July 1, 1970; Released July 2, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER WELLS DISSENTING.

1. In a Notice of Proposed Rule Making adopted February 18, 1970,[1] the Commission set forth its proposal to revise the existing schedule of fees on a broad basis. While the present proceeding is a reflection of the Commission's continuing review of this subject matter, its proposals reflect widespread changes in the existing fee schedule, designed insofar as possible to return to the federal government the amount of funds appropriated by the Congress for the Commission for FY-1971. Comments, both formal and informal, were received in large number and have been fully considered in the Commission's continuing analysis of such matters.[2]

2. The Commission first adopted rules providing for a schedule of application filing fees in 1963 (Docket No. 14507, FCC 63-414, 28 Fed. Reg. 4658; FCC 63-856, 28 Fed. Reg. 10911) and the initial fee schedule became effective on March 17, 1964. In adopting that fee schedule, the Commission stated that it would undertake a continuing review of the schedule. This continuing review has since been carried forward on a regular basis and a number of changes and modifications have since been made in the original schedule. In the current review and its attendant changes, we have fully considered the thrust of the legislation which vested authority in the Commission to establish the original schedule. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483(a)) and is applicable to all Federal agencies, reads as follows:

> It is the sense of the Congress that *any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency* (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations,

[1] A Supplemental Notice was adopted and issued on March 4, 1970.
[2] A list of the parties filing comments, formal and informal, would be too large to warrant reprinting.

partnerships, corporations or businesses), except those engaged in the transaction of official business of the Government, *shall be self-sustaining to the full extent possible and the head of each Federal agency is authorized by regulation* (which, in the case of agencies in the Executive Branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) *to prescribe therefor such fee, charge, or price, if any, as he shall determine,* in case none exists, or redetermine in case of an existing one, *to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts,* and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this Title shall repeal or modify existing statutes prescribing basis for calculation of any fee, charge or price, but this provision shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. [Italic supplied.]

3. The fee schedule initially adopted in 1964 established nominal fees and produced fee revenues which approximated 25% of the Commission's annual appropriation at that time, and subsequent changes in the fee schedule have generally maintained the same ratio between fee revenues and our annual appropriations. However, after judicial affirmation of the Commission's authority to establish a schedule of fees, the Bureau of the Budget has regularly urged the establishment of higher fee schedules and many other agencies have taken steps to adopt fee schedules calling for higher fees. In 1969, the House Appropriations Subcommittee expressed its concern about the Commission's fee schedule and stated that,

> The Committee also feels that fee charges should be further reviewed and adjusted upward with the objective of assuring that the activities of the Commission are more nearly self-sustaining. The Committee will expect a report on these items during the budget hearings for 1971.[3]

Thereafter, the Conference Committee on the Independent Office Appropriations Bill, 1970, supported the views stated above, stating with respect to our fee schedule that

> The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.[4]

Since the issuance of the Notice of Proposed Rule Making in this proceeding, in hearings on the Commission's appropriation for FY–1971, both the House and Senate Appropriations Subcommittees reiterated their view that the Commission should establish its schedule of fees on a basis which would make it self-sustaining to the fullest extent possible. The fee schedule adopted herein, as a revision of the initial proposal, has been prepared in the light of these executive and congressional directives and, based upon a reasonable projection of our activities during the coming fiscal year, should produce fee revenues which will generally approximate our estimated expenditures for FY–1971.[5]

4. Comments received from various industries affected by the Commission's fee schedule proposed in the Notice indicated a wide disparity

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[3] House Report 91–316, June 19, 1969, pages 7 and 8.
[4] House Report 91–849, November 18, 1969, page 6.
[5] This includes not only the expected regular appropriation of $24,900,000, but also additional expenditures deriving from the more recent federal salary increase.

between the resulting fee revenues as estimated by the Commission and as estimated by the industries affected. Though comments of this nature were widespread, they had particular emphasis in the area of common carrier regulation and equipment approval action. Particular scrutiny has been paid to these contentions and the fee schedule adopted herein now sets forth not only more simplified methods for establishing the amount of individual fee charges, but also a schedule of charges which have been carefully designed to reach an estimated total revenue within a reasonable range of the Commission's appropriations for FY–1971. In arriving at this goal, the Commission has given considerable but not exclusive consideration to its allocation of the cost of Commission activities as set forth in its Supplemental Notice of March 4, 1970. This breakdown of activity costs, both in terms of dollars and in terms of percentages of the total Commission budget request, is as follows:

		Percent
Broadcast	$9,661,200	38.8
Cable television	1,145,400	4.6
Chief engineer	323,700	1.3
Common carrier	4,631,400	18.6
Field engineering	1,294,800	5.2
Safety and special radio	7,843,500	31.5

It must be emphasized that these figures reflect only the cost factor and that other criteria such as "value to recipient" and "public policy and interest served" have also been considered in establishing the fee schedule set forth herein on a practicable, fair and equitable basis. In this connection, numerous comments were to the effect that where the Commission determined that public policy considerations warranted various exemptions from the fee schedule, e.g., state and local governments, non-profit licensees, etc., the cost of regulation of such activities should in effect be deducted from the total of fee revenues sought to be obtained by the Commission. These comments overlook the fact that there is no requirement that individual fee charges must be tied directly to processing costs or that individual activity costs set an outer limit for fee revenues resulting from such activity. The statutory objective is that the Commission shall establish a fee schedule which, after consideration of all of the factors referred to in 31 U.S.C. § 483(a), should produce total revenues which would make the Commission self-sustaining to the fullest extent possible. This general objective encompasses within it not only appropriate variations amongst the different Commission activities and staff units, but also appropriate variations between annual appropriations which may be enacted by the Congress some time after the beginning of the fiscal year, and may reflect changes from our budget request, and estimated fee revenues which must be based only upon projections of future activity and of the future impact of fee charges on the extent of such activity.[8] As revised from the initial proposal and keeping in mind the imponderables described above, it is estimated that the fee schedule adopted herein will produce the following revenues:

[8] Thus the Commission anticipates that the increase in the fee for restricted radiotelephone permits will operate to decrease the number of applications received for such permits although the extent of such cut-back is not presently ascertainable.

Broadcast Bureau	$9,600,000
Cable Television	1,145,000
Chief Engineer	355,000
Common Carrier	4,700,000
Field Engineering Bureau	2,007,300
Safety & Special Radio	7,750,300

The total revenue on a Commission-wide basis is $25,558,500, if the fee schedule were in effect for the entire fiscal year 1971.

5. Many comments alleged that the Commission's proposed fee schedule constituted a system of taxation which was beyond the authority of the Commission. It is clear to us, however, that the fee schedule adopted herein is directly tied to "work, service . . . benefit, privilege . . . franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued" by the Federal Communications Commission, and that the fees set forth in such schedules are fair and equitable and have been established after taking into consideration direct and indirect cost to the government, value to recipient, public policy or interest served and other pertinent factors. As such, the fee schedule adopted herein, like its predecessor, is clearly within the authority of the Commission under Title V of the Independent Office Appropriations Act of 1952. (See *Aeronautical Radio Inc.* v. *F.C.C.*, 335 F 2d 304; *cert. den.* 379 U.S. 966.)

6. As described in the Notice, the fee schedule adopted herein imposes fees in two additional areas which are not now subject to fees of any kind, but are the subject of Commission regulation and which directly or indirectly receive what in effect is a Commission authorization tantamount to a "license." The first area concerns Community Antenna Television systems which, as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations adopted during the past five years. The Commission's authority to regulate the conduct of CATV activities under various permissive and restrictive regulations was affirmed by the U.S. Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Its regulation of this type of interstate communication service now constitutes a substantial portion of the Commission's responsibilities, and a major staff unit has now been given permanent status to deal with this area. While the Commission's regulatory approach does not require a prior approval by the Commission in the form of a "license" before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations. There, therefore, appears to be no reason for distinguishing this service from other communications services which the Commission authorizes and which are now encompassed in the present fee schedule.

7. The second additional area of Commission regulation and authorization reflected in the revised fee schedule adopted herein is in the field of radio frequency equipment testing and approval. The Commission long ago established technical standards for various kinds of

radio frequency equipment which could be used under Commission authorization. While these restrictions were imposed upon the users of radio frequency equipment, the Commission permitted equipment manufacturers to avail themselves of its testing, review and approval procedures.[7] Having obtained Commission approval in advance, radio equipment manufacturers were thereby enabled to assure prospective purchasers that the equipment was in compliance with the Commission's technical standards applicable to such radio equipment. Subsequently, the enactment of Section 302[8] of the Communications Act established a prohibition against the importation, shipment or sale of radio frequency devices which did not comply with Commission regulations in this area. Rules have now been adopted, effective October 1, 1970, which would require type approval, type acceptance or certification of such devices prior to their importation, shipment, or sale.[9] Thus, in effect, the equipment approval actions of the Commission will be tantamount to an authorization which must be obtained prior to importation, shipment or sale of radio frequency devices. The Commission's activities in this area are not insubstantial and currently average some 1800 type approval, type acceptance and certifications, annually. The fee schedule, therefore, includes an appropriate schedule of fees for these various kinds of radio frequency equipment approval actions.

8. Some further observations of a general nature may be in order as to the considerations which have been taken into account by the Commission in establishing the separate license or authorization fees included in the proposed schedule. These have been established in light of the differing factors which are unique to one or another of the many communication services under the broad aegis of the Commission. For example, licenses in the broadcast services are by statute limited to a maximum of three years, while the grant of certificates of public convenience and necessity for common carrier communication services under Section 214 of the Act are without such time limitations. The latter situation also applies to equipment approval actions and our authorization, by rule, of CATV system operations. Similarly, the "value to the recipient" factor needs be considered on a different basis amongst various services by reason of their different characteristics and operations. Broadcast services are commercial enterprises which exist on an "advertiser-supported" basis, without direct charge to the listening public, while common carrier communication companies provide their services to all users at charges set forth in tariffs. On the other hand, CATV systems operate on a somewhat similar basis as common carriers, but their provision of but one kind of service to each subscriber at the same price permits a different approach in considering "value to the recipient" than is possible with communications common carriers which utilize the same facilities for the provision of different services to different customers. Again, our equipment approval actions are taken with respect to many different types of equipment, and our consideration of the "value to the recipient" factor

[7] "Type Approval" procedures involve equipment testing by the Commission's laboratory. "Type Acceptance" and "Certification" procedures involve testing by the equipment manufacturer and analysis of test measurements by Commission engineers.
[8] 47 U.S.C. § 302.
[9] Docket No. 18428, 34 F.R. 1057.

in establishing fees needs consider the small amount of processing costs involved. We have therefore selected different bases for considering "value to the recipient," both for different types of actions within each service and similar types of action among different services, which we believe are fair and equitable. We fully recognize that the factors we have used may not wholly or precisely reflect "value to the recipient." But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard. Revenues of our broadcast licensees in 1968 approximated 3.5 billion dollars. Revenues from our authorized common carrier communication services in 1968 came close to 16 billion dollars. In the same year, CATV system revenues approximated $220,000,000 and in 1968, total sales of communications equipment under our equipment approval actions exceeded 3 billion dollars. Obviously, these figures are the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations to the persons and companies receiving them. Nonetheless, they do serve to place in perspective the very limited extent to which the Commission has considered the "value to the recipient" factor in establishing the fee schedule adopted herein.

9. Other factors taken into consideration by the Commission in establishing a schedule of fees warrant mention. Simplicity of computation and ease in the administration of the fee system is reflected in the different approach being adopted in the schedule of fees for equipment approval actions. The tremendous number of applications filed in the Safety & Special Radio Services, in excess of 562,000 annually, together with the minimal percentage of denials of such applications militates against the establishment of separate application filing fees and license fees at this time because of the tremendous paper work involved. Where feasible, groupings have been made of different kinds of applications and authorizations and a common fee established for the entire grouping in order to avoid undue complexity. Finally, it may be noted that the widespread use of restricted radiotelephone permits for purposes other than use of communications equipment has led to an increase in the fee for this life-time permit which is designed to cut down on the demand for this kind of authorization.

10. *Effective Date of New Fee Schedule.* The Fee Schedule adopted herein is being made effective as of August 1, 1970. While the demands of time and workload may not permit publication in the Federal Register at least 30 days prior to August 1, 1970, the Commission believes that good cause exists for the adoption of this effective date. Actual or constructive notice will, in fact, be given to the industries and persons affected through the publication and release of numerous copies of this Report and Order by the Commission's Information Office immediately after adoption. Publication in the Federal Register should take place not later than the week of July 5–July 11, 1970 and widespread notice of the newly adopted fee schedule will undoubtedly be given by the press and numerous trade publications in the field. Since the fee schedule adopted herein sets forth annual fees in several areas,

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fees on a monthly basis for
and since there will be pro-ration of such ary that the fee schedule be
the balance of the first year, it is necess nth, and, in accordance with
made effective as of the beginning of a mo hat it cover as much of fiscal
the Congressional directives cited above, t
year 1971 as is reasonably possible. nder the effective date of

11. *The impact of effective date.* U by the Commission on and
August 1, 1970, all applications received he new fee schedule. Grants
after August 1, 1970, will be subject to t be subject to applicable fees
made on or after August 1, 1970, will not with the Commission prior to
if the application for such grant was filed w fee schedule.[19] Annual fees
July 1, 1970, the date of adoption of the ne he anniversary date of the
for broadcast stations are payable on t ear under the new fee sched-
expiration of the license, and in the first mber of full months of opera-
ule, the fee is to be pro-rated over the num the next payment date. The
tion beginning on August 1, 1970, until on or before April 1 of the
annual fee for CATV systems is payable ch the fee payment relates.
year following the calendar year to wh effect on August 1, 1970, the
Since the CATV annual fee will go into l to reflect the fact that the
amount payable in 1971 will be prorate 970.
fee applies only to the last five months of 1

12. *Collection Procedures.* Rules adopte d herein set forth procedures
for the collection of fees which are designe d to make these operations as
simple as possible. Fees that are establish ed for the filing applications
must accompany the application. In th e absence of such fee, the
application will not be considered by the C ommission. Where fees have
been established in connection with the is nance of a grant or authori-
zation by the Commission, the prescribe l fee will be payable within
45 days after the issuance of the grant or authorization. While the
Commission will not hold up the issuance of such grants or authoriza-
tions, the rules provide that they will be c onditioned upon subsequent
payment of the fee within the prescribe l time, and failure to make
such payment will result in cancellation o f the grant or authorization.
Annual fees will be payable in the broadca st services on the anniversary
date of the expiration of the license, a nd in CATV on or before
April 1 of the year following the cale ndar year to which the fee
payment relates. Failure to pay such fee s in the prescribed fashion
may call for appropriate remedial actio by the Commission under
Section 312 until the requisite fee has been paid.

13. *Special Temporary Authorizations and Waivers.* As set forth
in paragraph 15 of the Notice, some 15,000 applications for special
temporary authorization or for waiver u nder the Commission's rules
are filed with the Commission annually an d relate to all of the services
encompassed in the fee schedule adopted herein. We have determined
that it is appropriate to establish fees for the grant of STA's or
waivers which represent a marked depar ture from our rules because
of unusual circumstances and situations, or which encompass dispensa-
tion or authorization of an important character, or entailing special
efforts on the part of the Commission in processing them. The grant

[19] It is to be understood, of course, that application processing during the period between July 1 and August 1 will proceed on the normal course, and action will not be held up because of the imminence of the August 1 grant date.

of STA's or waivers which look simply to minor departures from our rules or to temporary operation of short duration will not be subject to fees. The different schedules adopted herein now prescribe fees ranging from $5 to $25 for the grant of STA's and waivers of the former type. It is not possible to definitively set forth all of the STA's and waivers which are of such an important character as to warrant the payment of the prescribed fee. This will be determined by the Commission at the time the application for STA or waiver is considered, and upon issuance of the grant, the recipient thereof will be notified of his liability for payment of fees, if any.

Broadcast Services

14. Of the comments filed by the broadcasting industry or broadcast oriented associations, two comments were in general support of the fee schedule as proposed. The other parties opposed the fee schedule, either in whole or in part. The comments in opposition raised three types of challenges: (1) the general challenge of legality to the entire fee schedule; (2) excessive allocation of fee burden to the broadcast industry; and (3) specific challenges to certain portions of the proposed fee schedule. The general legal arguments and allocation questions have been discussed above. Therefore, this portion of the Report and Order deals only with the comments directed at the broadcast fee schedule as proposed.

15. *Fees for Construction Permits.* The few comments concerning fees for construction permits dealt primarily with the proposition that fees from construction permit applications would have a deterring effect on qualified persons filing for new facilities and a very undesirable effect on existing broadcasters that need to improve their facilities. It is claimed that the result of these fees is that needed local service will be curtailed in small markets, and that needed improvement to marginal facilities will either be delayed or forestalled completely.

16. The Commission has considered the comments of the parties with respect to the foregoing contentions. Based on all the factors, i.e. activity costs in the broadcast field, value to recipient, public policy or interest served and other factors, we believe the fees are realistic in relation to the fees in the other services. On April 14, 1970, the Commission broadened the definition of "minor change" applications. Therefore, significant changes can now be made to an existing station's facilities under this new interpretation. While experience may prove a different result, we do not believe that the fees for applications for construction permit for new facilities or major changes in existing facilities will have a significant effect on a person's overall decision to apply for a new or improved facility.

17. Several parties urged that involuntary major modifications, such as the pending move of the antenna systems of the New York television stations to the World Trade Center, should not be subject to the new fee schedule. It is difficult to formulate a general rule in this type of case and, in many cases, a substantial improvement in facilities may take place. Section 1.1105(a) of the present rules re-

flects Commission consideration of this type of problem and will continue as the guide for action in specific cases.

18. For purposes of clarification in the assessment of fees for construction permits for standard broadcast stations, operating with different power day and night, the applicable fee will be for the highest power requested. For example, if the application calls for power of 250w, 1 kw-LS, the fee for a 1 kw operation would be the one assessed.

19. *Fees for Assignment and Transfers.* A large number of comments concerning this portion of the broadcast fee schedule were directed to both the substance of the fee schedule and to the necessity of adopting certain specific procedures for administration of the assignment and transfer fees. In assignment and transfer proceedings, the Notice proposed that the fee would be payable within 30 days after the Commission consented to the assignment or transfer. Several parties urged that this payment schedule could cause numerous problems because the cash for payment of fees is often not available until the transaction has been consummated. It is also pointed out that many sales are never closed due to changed circumstances, and thus the grant fee would not be required. Because of uncertainties of the date of closing and other factors, the Commission has revised the rule so that the new licensee or transferee will become liable for the grant fee only upon consummation of the assignment and must transmit such fee at the same time that the Commission is notified of the consummation.

20. Some of the parties have raised the question whether the assignor/transferor or assignee/transferee is liable to the Commission for the fee. While the financial burden may be allocated as between the parties by contract, the assignee/transferee would be liable to the Commission for payment of the requisite fee.

21. The parties have also urged that assignments and transfers *from* receivers, trustees in bankruptcy, and persons who have taken title from an insolvent or bankrupt licensee, *to* a new ultimate licensee should be exempt from the grant portion of the fee. The basis of their comment is that the grant fee will serve to reduce the ultimate distribution to the creditors of an unsuccessful licensee. The grant fee may well have an effect on the overall sales price of the broadcast stations, but the Commission believes the assignee or transferee, as well as the interim licensee and the creditor, receive substantial benefit from the Commission's action. For instance, competing applications cannot be filed against the application filed by the receiver. Also, the buyer will be one who is financially qualified to perform under the contract, thus giving certainty for the creditors. The Commission believes that the general rule should obtain.

22. With respect to the filing and processing of the assignment and transfer applications, the parties filed numerous comments relating to the computation of the consideration for the assignment or transfer. The Commission is well aware of the difficulty of computing the consideration in cases where cash or other ascertainable market value is not specified. However, there is consideration to support the assignment or transfer in all cases, and the amount of the consideration is therefore a question of fact. The three most difficult areas will be the

cases (a) in which the broadcast properties are only a portion of an entire sale such as one corporation buying a multi-media corporation, (b) cases in which there is no readily ascertainable market value for the consideration, such as the case involving transfer of stock of a closely held corporation, and (c) cases that involve consultant and non-competition agreements. In the case in which the broadcast properties are just a small part of an entire transaction, the question becomes one of allocating a portion of the consideration to them. The rule of reason will be followed in this matter. For instance, if separate corporations are or will be in existence for the broadcast properties, a reasonable allocation has to be made for tax purposes. In all likelihood, the Commission would accept such valuation. Or, the relative value of the underlying assets may be the most reasonable basis for allocation. If the amount of the consideration is not certain or readily capable of being reduced to certainty, we would encourage the parties to confer with appropriate Commission personnel for assistance in determining the amount of the consideration allocable to the broadcast portion of a transaction. The Internal Revenue Service bases many of its computations involving gain or loss on the sale of property on the "amount realized", which is a fair-market value concept. The Commission would, in the absence of unusual circumstances, accept this valuation in non-cash transactions as the amount of the consideration for basing the fee. The Commission realizes that some additional work is being placed on the parties in this regard, but fair-market value is a sufficiently definite standard on which to base fees in cases such as those involving a transfer of stock in a closely-held corporation. Insofar as amounts paid for consultant and non-competition agreements that are a part of the overall price of a sale, the Commission will follow the general principle of tax law, which permits a reasonable allocation of the total price to such agreements.

23. In the assignment and transfer field, the comments raised other specific questions. One is that fees should not be assessed in divestiture cases based on the decision in Docket No. 18110, the so-called "one-to-a market" proceeding. Here again, Section 1.1105(a) will serve as a guide to Commission action in this area. Certain parties have raised the question that an appearance will be created that one of the considerations of the Commission in favorably acting on an application will be the fee return. The Communications Act *requires* the Commission to make certain specific findings with respect to the grant of an application that cannot be abrogated except by Congress. There is no substance to the parties' contention. One other specific objection to the assignment and transfer grant fees has been raised. This is that the assignment and transfer grant fee and the annual operating fee amount to a "dual levy" on a station. The contention rests on the fact that the Notice stated that future profitability of a station is reflected in the sale price which amounts to "value to the recipient"; and, since, the annual operating fee is based on the "rate card", it also is a measure of value. However, it is clear that value to the recipient does not rest on any single factor in any case. In sales, the fact that a person's purchase application is insulated from a competitive hearing has very significant value. Future profitability, as well as other things, are factors in arriving at

the purchase price. The annual operating fee is based on a going-concern concept of value. The two charges rest on different, but not inconsistent concepts. Certain parties contend that the 2% grant fee in assignment and transfer cases is unfair because it does not appropriately reflect "cost to the government". However, the applicable statutory basis for our fee collection authority recognizes many factors, including "direct and indirect cost to the government", "value to the recipient", as well as others in setting fees. Another point raised is that the 2% fee could have a dampening effect on interested buyers of marginal stations. This may be true in some cases, but the fee is just one factor of many in a buyer's mind as he assesses a purchase of a broadcast station.

24. *Annual operating fees.* As we noted above, a substantial number of parties filed comments in this area alleging that the Commission is without authority to assess the annual operating fee. Certain specific objections were also raised. The major area of specific comment was directed at the use of the rate card as an index of value of the station's license. One of the arguments is that the rate card is just one factor to be considered in determining the value of a station's license. The thrust of a number of comments is that one station may have a low rate card, a high concentration of commercials and skimpy programming, while another may try to limit the frequency of commercials by having a higher spot rate. No doubt, various stations in a market will have different sales policies. This will result in different spot rates, but it is an objective index of value. The Commission is well aware that some disparity as to value exists. Over the long run, we believe that the spot rates will prove to be a feasible index of value. Licensees will therefore be required to file with the Commission a copy of the rate card in effect on June 1 of each year. The rate card must be filed at the time the annual operating fee is payable (i.e. anniversary license date). Any licensee claiming that the June 1 rate card is not reasonably descriptive of its yearly average may petition for filing of a more appropriate rate card.

25. A more specific objection is the one that stations rarely sell a highest one minute (radio) or 30 second (TV) spot announcement. Therefore, licensees will revise their applicable spot rates to reduce the amount of the annual operating fee. Licensees may well revise spot rates, but the amount of their respective rates will be in the public file. This will cause parties to file realistic data in relation to competitors. In the forseeable future, at the time a review of fees is made, we may find that another rate, such as the "5 times" the highest rate will be more feasible. The spot rates used in the proposed schedule will be adopted, subject, of course, to a continuing review of fees.

26. Specific comments requested clarification as to joint AM–FM rates and rates for satellite television stations. The Commission will permit the payment of a single fee for joint AM–FM rate operations based on the highest one minute joint rate. No allocation will be required at this time between AM and FM. If satellite television stations are sold as a package with the parent station, a single annual fee will cover both operations.

27. Some comments claimed that the notice was ambiguous as to

whether renewal application fees would be abolished if the annual operating fee concept were to be adopted. We wish to clarify the matter by stating that, upon the effective date of the fee schedule, renewal fees for all broadcast applications will be abolished in favor of annual operating fees.

28. While many comments objected to the size of the annual operating fee, the Commission finds that the multiple of 12 and 24 for television and radio, respectively, when applied to the spot rate, is not excessive when considering the value of the license. However, a number of the parties have urged that the Commission grant some relief from the annual operating fee in marginal and hardship cases. Primarily, the claim is that small market radio and UHF stations may be forced to curtail service and, in some instances, cease operations. The parties further point out that the annual fees are being added at the time that broadcast stations are suffering other revenue losses such as curtailment of cigarette advertising revenue and discounts for political broadcasting, as well as advertising competition from CATV. The parties note further that stations must also bear the recently increased transmission costs charged by American Telephone & Telegraph Company. The comments also pointed out that, based on the Commission's own data, 28% of all AM and FM operations, 65% of independent FM operations, 14% of the VHF television stations, and 55% of the UHF stations reported losses. The Commission is very aware that broadcasting is a competitive industry and takes notice of the significant number of unprofitable stations in the industry. We have considered the comments of the parties, especially as to the question of whether the annual operating fees will cause a diminution of program service by broadcast stations, in general, and marginal stations in particular. However, in the case of television stations, the annual operating fee will only be equivalent to the stations' charge for one spot announcement each month and for radio, two spots per month. Such fees should not constitute a significant burden in a broadcast station's total operations. The Commission will maintain a continuing review in this area and, if the facts indicate a change is necessary, it will be made. We therefore adopt this annual fee schedule for all broadcast licensees.

29. Comments were submitted which urged that the Commission reexamine the question of the desirability of charging fees for station auxiliaries. Since the renewal application fee has been abolished for the parent broadcast stations, and the auxiliaries are an integral part of the broadcast operation, the annual operating fee is reflective of the entire operation. Therefore, separate fees for renewal applications of broadcast auxiliaries are also being eliminated.

30. With respect to translators, several parties urged that all fees be abolished for television translator stations. The prime ground urged is that very few translators are profit making either in nature or practice and do bring sorely needed service to remote areas, and therefore any fee is a hardship. Since the annual operating fee is also a reflection of the feeder television station and all translators carrying it, we believe that fees for renewals of translators should similarly be eliminated. The few nominal fees for construction permits for translator stations are also being eliminated, because many translators are com-

munity owned and are not operated for profit. While a few translators may be operated for profit, the small loss of revenue, when balanced against the necessity of classifying various types of translators, enables us to reach that result.

31. We also received very specialized comments requesting exemption from fees for broadcast stations operated by organizations that are exempt from paying income taxes, even though the stations are not classified as noncommercial educational stations, but who do not accept commercial spots or any commercial sponsorship. Also some college broadcast stations, that operate on a limited commercial basis, requested an exemption from the grant portion of the fee for construction permit. The Commission does not have sufficient factual data to enable it to classify and delineate specific exemptions to stations that do not operate commercially, but who are not classified as noncommercial educational stations. Therefore, we will not "carve out" any exemptions in this class at this time, but will examine the matter in future reviews.

32. One party urged that the Commission adopt fees for the processing of data filed by the networks. The Commission believes that it would be inappropriate to adopt such a schedule at this time, but we will maintain a continuing review of the Commission's functions and duties, including those relating to the networks, and will revise, discontinue or adopt fees as the circumstances dictate.

Common Carrier Services

33. Comments in response to the Notice of Proposed Rule Making were received from a number of communications common carriers, including telephone and telegraph carriers, ComSat and organizations providing mobile radio telephone service and paging services or point-to-point microwave communications services. Most of the respondents expressed opposition to the proposed use of a percentage of construction or annual lease costs as a measure of grant fees for facility authorizations. AT&T and other representatives of the telephone industry contend that such costs do not uniformly or accurately reflect "value" to the applicant, as construction costs may vary widely for reasons unassociated with the revenue-producing capacity of the plant being constructed. Added costs of underground or hardened facilities for national security or for protection against natural disasters, and the provision of facilities to very remote locations in the public interest are cited as factors in support of this position. AT&T in its filing also avers that reconciliation of estimated and final costs, as required by the initial proposal, would be difficult and time consuming and would impose substantial additional bookkeeping and accounting burdens on the industry and Commission alike.

34. A number of the miscellaneous common carriers (microwave) and those in the domestic public land mobile radio service also objected to the concept of grant fees based on construction costs, although generally on different grounds. Most of these carriers feel that the construction cost concept would place a much heavier relative financial burden on them than on the conventional telephone and telegraph

carriers, and also discriminates in favor of private radio systems for which no grant fees are proposed. AT&T suggests an alternative plan of relating grant fees to maximum authorized bandwidth for common carrier radio authorizations and to interstate voice channel miles authorized by the grant of applications filed under section 214 of the Act for certificates of public convenience and necessity, and other applications which do not lend themselves to these yardsticks to be charged flat fees. The United Telephone System also recommends that the grant fees be based on a similar concept, suggesting route miles as an appropriate measure.

35. We do not favor authorized bandwidth as a measure of fees for radio services because of inequities which would result from the diverse bandwidth requirements and technical standards of radio services operating in different parts of the spectrum. We do, however, agree that channel miles authorized better signifies "value to the recipient" for authorizations to construct and operate communication channels on wire, cable, microwave, or satellite facilities than does construction cost. Moreover, this approach will simplify determination of correct fees at the time of grant and will eliminate the accounting burden of isolating and reconciling final construction costs with the estimated costs contained in the application. Consequently, the fee schedule has been restructured to delete the proposed use of a percentage of cost as the basis of grant fees for construction applications, with the substitution of communication channel miles as a measure of grant fees for Section 214 facility applications,[11] and the use of flat license fees for services not conducive to the channel mile treatment, as set forth in the attached schedule.

36. Specifically, the new schedule calls for flat grant fees for construction or modification of base stations in the Domestic Public Land Mobile Radio Service, in lieu of a percentage of construction cost, and also for central office stations in the Rural Radio Service and for point-to-point microwave construction authorizations. In the Satellite Communications Service flat fees are proposed for earth station construction permits and for grants to construct and launch satellites. For common carrier nonradio applications involving construction of cable routes (both landline and overseas) or the establishment of communication channels on existing wire, cable, radio or satellite facilities or the lease of such channels from another carrier, the grant fee is based on the mileage and number of channels authorized, with specific charges per unit for the various categories as specified in the schedule.

37. The flat fees proposed for the public land mobile radio service should serve both to relieve the alleged excessive financial burden on these carriers and reduce the disparity between these common carrier services and private mobile radio systems. A threefold increase in fees for these authorizations is minimal in relation to the 25-fold increase

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[11] The number of each type of communication channel to be provided and route mileage is now required in Section 214 applications or by § 21.706 of the Rules for those carriers who elect to include a description of the proposed facilities as part of their microwave radio applications, in lieu of filing a separate 214 application. For ease of administration of the fee plan, we would propose to require all carriers to file separate Section 214 applications for authority to channelize microwave routes.

required of common carrier services in total. Likewise, the flat fees now suggested for microwave construction permits will lessen the initial disparity between common carrier and private microwave systems, coupled with the upward adjustment in the filing fee for private systems, as discussed in the Safety and Special Radio Services section of the Report and Order. We do not consider a fee of $200 for common carrier microwave construction permits to be excessive, in light of Commission processing costs and value of the authorization to the applicant, although recognizing that the channel mileage fee will also be applied to those routes, if and when channelized to provide interstate communication services other than video.

Safety and Special Radio Services

38. In the hundreds of comments filed discussing the fees proposed for the Safety and Special Radio Services, the most common objection was that the fees do not reflect the Commission's actual costs of processing these applications. However, as stated in the Notice in this proceeding, the fees we have proposed are designed to cover the entire range of regulatory costs of the Commission and not simply application processing costs in particular services. They also take into consideration value and personal benefit to the recipients of licenses. The fees adopted herein meet these criteria. Thus, while the comments are accurate in suggesting that the fees exceed application processing expenses, there is no merit to any contention that they are excessive, unrelated to the costs of these services, or beyond the scope of our authority.

39. Another contention made by many was that the general public is, in fact, the principal beneficiary of the activities of licensees in the Safety and Special Radio Services and, therefore, the general tax revenues should be used to support at least a part of the Commission's expenses. A variation of this argument presented by some was that it is unfair to raise the fees for most Safety and Special licensees while continuing the fee exemptions for some categories of licensees in these services. In particular, it was urged that the public, through the general tax revenues and not the other Safety and Special licensees, should bear the expenses related to regulating these categories of nonfee-paying licensees. Under the current fee schedule which has been in effect for several years, several categories of licensees have been exempt from fees and propose to continue these exemptions. To a large extent, they cover stations connected with public safety activities, state and local government services, disaster, emergency, and rescue activities, some educational work, regulatory work connected with the compulsory safety at sea program, and beginning Amateur radio operators. We consider these exemptions appropriate and in the public interest at this time and we note that objections were not directed to the specific exemptions themselves. The objection made reflects the mistaken notion that some licensees will be paying for the regulatory costs of other classes of stations. Our total fee schedule has been adjusted to cover all Commission costs, taking into account the regulatory expenses connected with particular services and also the value of the radio authorization to the

licensees. In every instance of the new fees adopted herein for the Safety and Special Radio Services, there is no case where the fee is excessive, unreasonable, or unwarranted when value to the recipient is taken into account along with regulatory costs. Under these circumstances, there is no merit to the contention that some licensees are bearing the expenses of others.

40. Another objection was that the revenues raised through the collection of these proposed fees would exceed the "Bureau's share of the Commission's budget." A short answer to this contention, as more fully set forth in paragraph 4 above, is that there is no requirement in the statute that the "Bureau's share" of fee revenues shall not exceed its share of the Commission's budget or the cost of the Commission's activities involved therein. As set forth above, the Commission's breakdown of activity costs was an important, but not an exclusive, factor in establishing the fee charges adopted herein. However, there is no merit either in fact or in principle to the contention that Safety & Special Service licensees will be subsidizing other services. It has been clear for some years that a major portion of the Commission's fee revenues since the adoption of the fee schedule in 1963, have derived from the Safety & Special Radio Services. But since this apparent disproportion was not based upon discriminatory factors, the validity of the existing schedule has passed the test of judicial review, as cited above. In the same vein, the fee schedule adopted herein is no less valid because the estimated fee revenues from the Safety and Special Radio Services fall some $93,205 short of the $7,843,500 of Commission costs allocated to such activities.

41. Some concern was expressed that the Safety and Special Radio Services fees will increase in the future if the Commission is to recover its budgetary costs through the assessment of fees. It is reasoned that so long as governmental expenditures rise, the Commission will have to resort to higher fees to remain substantially self-sustaining. In this context, concern was expressed that present and future spectrum management costs would be included in the Safety and Special Radio Services activity costs. In fact, the Safety and Special activity expenses now include its share of spectrum management costs and will continue to do so in the future. If the regional spectrum management project now under development and experimentation is continued and expanded, it may be expected that the costs of this program will be borne by the beneficiaries thereof. In any case, the Commission is obligated to keep the matter of fee schedules under continuing review, and if expenses of regulating these services rise, it may be expected that fee schedules must be adjusted upward.

42. The opinion was expressed by some that the fee to renew a station license should be considerably less than the $19 fee which was set forth in the Notice of Proposed Rule Making as a basic fee for most of the Safety & Special Radio Services. Contrariwise, broadcasting interests noted that the ranks of the land mobile licensees include some of the largest and most profitable corporations; that land mobile users report substantial savings as a direct result of the use of land mobile radio; and that, under these circumstances, land mobile licensees should be required to pay more than the $19 fee. As previously set

forth, the standard fee we proposed to establish in the Safety and Special Radio Services reflected the tremendous number of applications received in these services. Further, the benefits and value of a radio license to a Safety and Special Radio Service licensee is not readily comparable to the benefit and value of a radio license to a communications common carrier or to a broadcaster, and the same criteria are not applicable. For most Safety and Special Radio Services licensees, the authorized use of radio facilities is an adjunct to the licensee's principal business or for safety purposes, and the regulatory programs connected with these services are different from those associated with the regulation of the broadcast and common carrier services. However, in order to more equitably distribute respective shares of estimated fee revenues amongst the various services, the fee schedule adopted herein provides for an increase in the basic fee for most Safety and Special Radio Services to $20, as against the $19 previously set forth in the Notice of Proposed Rule Making. As indicated above, this further change will still leave Safety and Special Radio Service's share of fee revenues below the amount of allocated activity costs set forth in paragraph 4 above.

43. Since the proposed fee schedules for the Safety and Special Radio Services were first published in the Notice of Proposed Rule Making, certain changes to Section 1.1115 have been made in response to the comments we have received and as the result of our own further reflection:

(a) The fees we will require of Operational Fixed stations using frequencies above 952 MHz have been raised from $35 to $75. We have reconsidered our original proposal, and feel this increase is warranted in view of the administrative effort devoted to the licensing and regulation of this category of station.

(b) Many amateur radio licensees stated that the basic fee proposed for the Amateur Radio Service ($9) was too high, especially when compared to the fees that must accompany applications for commercial operator's licenses. We believe, however, that this difference can be justified by the difference in the services involved (i.e., the commercial operators' license is necessary to employment as a commercial operator, while the amateur is essentially a hobbyist, although oftimes performing an important service). We also considered the suggestion that in the Amateur Radio Service there should be an examination fee and a license fee, rather than a single fee for all Amateur applications. We deny this suggestion because of the impracticability of administration.

(c) Another exception to those requests which do not require a fee has been added. A licensee will be permitted to file a request to correct clerical, typographical, and other similar errors made in an application for license, without submitting an accompanying fee, if the request is filed within 60 days of the grant.

(d) A new subparagraph has been added to permit a refund whenever a formal application not required by our Rules is filed by a current licensee in the Safety and Special Radio Services. A typcial situation covered by this new provision would be where a corporation files a formal application to change its name without any concurrent change in its corporate structure or ownership, instead of simply noti-

fying the Commission of this change by letter, as permitted by our Rules.

(e) At the present time, our rule covering the Safety and Special Radio Services reads in terms of "formal applications" and except for requests for duplicate licenses, STA's, and waivers, there was no intention to extend the applicability of fees to other than formal applications. Although the word "formal" was left out of our proposal by inadvertence, we are using it again in the rule herein adopted. Otherwise, the rule might be construed to have broader application than intended.

CATV

44. Elsewhere in this Report and Order, we have dealt with such underlying questions as: (i) whether the Commission is legally authorized to establish a fee schedule which will provide the General Treasury with revenues sufficient to substantially offset the Commission's budgeted expenditures; (ii) whether, in particular, the CATV schedule is unfair as a whole either because (as some CATV parties allege) CATV regulation is primarily for the benefit of the television broadcast industry, and the latter industry should bear the costs, or because (as some broadcast parties allege) the schedule fails to anticipate a rapid proliferation of CATV throughout the country accompanied by accelerating regulatory costs; and (iii) whether CATV operation may be viewed as a Federally licensed activity with respect to which the Commission may charge an annual fee.

45. Having already treated these and other broad questions of regulatory-agency-fee law and policy, we may now approach the particulars of the CATV fee schedule, and test each of the items therein with the simple question, "Is it fair?" We have modified somewhat the originally proposed CATV fee-schedule revision (as set forth in the Notice of Proposed Rule Making in this proceeding) in the light of that question and the comments which have been filed.

46. In view of the administrative burden entailed by petitions for special relief filed under Section 74.1109 of the Rules, we originally proposed a filing fee of $300 per petitioner. That fee has now been reduced to $25 per petition—in recognition of the fact that such petitions often draw the Commission's attention to situations in which the public interest would be disserved by routine application of the rules, and that parties considering the filing of such a petition should not be confronted with fees so high as to discourage them from doing so. The CARS $15 license application fee item has been corrected to make it clear that, as intended from the outset, the fee is for both new-license and license-renewal applications; the absence of a CARS license-renewal fee would be unjustifiably inconsistent with the schedule's provisions with respect to other licensed services. For the same reason, we have removed the annual-fee exemption originally proposed for CATV systems with 200 or fewer subscribers.

47. The 30-cents-per-subscriber-annual-fee formula has been attacked on diverse grounds: that it fails to take into consideration that different systems charge different subscription rates; that operating costs vary even when subscription rates are the same; that in some

cases local franchise agreements bar systems from passing increased costs on to subscribers via rate increases; and that the 30-cents-per-subscriber fee would cut sharply into narrow profit margins.

48. The very diversity of these criticisms (which were not accompanied by specific supporting data) suggests that it would be exceedingly difficult to devise a formula that would be proof against all attack. In defense of the formula adopted, we would note: (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year thus appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of the fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual reporting by CATV systems; and, finally, (v) that as the Commission obtains such information it will use it for periodic review of the equity of its CATV fee schedule.

49. The annual fee is payable on April 1 of each year for the preceding calendar year or part thereof.[42] It is computed on the basis of thirty cents times the number of subscribers during the calendar year. The number of subscribers is determined by averaging the number of subscribers on the last day of each quarter of the calendar year. The fee for periods less than a calendar year is the annual fee pro-rated by the number of full months covered.

Equipment Testing and Approval

50. Many comments indicated that there was no objection to the establishment of a fee schedule for equipment approval actions which was fair and equitable and recovered an amount approximating necessary expenses of the Office of Chief Engineer. However, there was strong opposition to the concept of a grant fee the computation of which was based on the manufacturer's selling price and the number of units of the particular type of equipment produced. It was stated that the "manufacturer's selling price" was not a term of art uniformly defined by all manufacturers and that the use of production figures could involve the disclosure of information which has always been regarded by the industry as confidential. In addition, it was alleged that a projection of fee revenues made by industry members under the formulas originally proposed would produce a return far in excess of the allocated cost of equipment approval activities as set forth in our Supplemental Notice and, indeed, much beyond the Commission's announced goal.

51. Our re-examination of this subject has led us to markedly revise the schedule of fees for equipment approval actions. In lieu of the formula previously set forth, the fee schedule adopted herein provides for

[42] The date of filing of the annual financial report, if required (See Docket 18397) will be coordinated with the fee payment date.

a flat filing fee ranging from $5 to $200, as well as a flat grant fee ranging from $15 to $800 for each model or type of equipment covered by the Commission's equipment approval action. As set forth in our rules, application filing fees must accompany each application for equipment approval action.[23] Our past experiences in equipment approval activities indicate some 1800 separate approval actions, many of which cover several models or types of the basic equipment. This is a new area for the Commission's fee schedule and we do not yet have the experience or the information which permits the adoption of a more refined schedule of fees, which would more accurately and precisely reflect the "value to recipient" factor, a fundamental aspect of the Commission's new fee schedule. We believe, however, that the simplified schedule adopted herein, which reflects primarily the cost to the government, is generally fair and equitable and emphasizes the factor of simplicity from the standpoint of the industry affected.

52. Some comments, notably from aviation interests and others manufacturing equipment for government, military or foreign entities, or for emergency services, urged exemption from the fee schedule of those categories of equipment. Additionally, a number of comments suggested that consideration be given for those equipments used in serving the general public, e.g., navigation aids, etc. These comments mistake, however, the thrust of the Commission's fee schedule in this area. Fees are being established in connection with the Commission's equipment approval action without regard to the type of equipment involved. If the particular equipment is required by any other rule or statute to be approved in connection with its shipment, sale or use, then a fee is properly chargeable for the work and benefit involved in such action. The important factor is the necessity or desirability of equipment approval action and not in the ultimate purpose or destination of such equipment.

53. One other comment indicated that since certain industrial heating equipment might not include conventional receivers or transmitters, it should not be subject to fees. This contention, too, is beside the point. Fees have been established to cover the work and benefit involved in equipment approval actions regardless of the type of equipment in question. If equipment approval action is requested and obtained, the fees set forth in the schedule adopted will be payable.

Commercial Radio Operator Licenses and Examinations

54. The present fee schedule relating to commercial radio operators encompasses one fee to cover both the application to take radio operator examinations and the subsequent issuance of a license. The schedule adopted herein makes no change in this approach. While new fees are established for applications for verification cards and posting statements, no increase is made in existing fees except for the issuance of restricted radio telephone permits. This increase is based in part on the fact that commercial radio operator licenses are normally issued

[23] Our proposed revision in procedures, announced in connection with our rules adopted under Section 302 of the Act, look to a clearly defined two-step procedure of application filing and subsequent action on such applications, but is not yet completed. The application filing fee for equipment certification should accompany the certificate filed by the manufacturer and the grant fees will be payable upon Commission acknowledgment and approval.

for a period of five years, while restricted radio telephone permits are valid for the lifetime of the holder. However, the proposed increase to $10.00 set forth in the Notice has been reduced to $8.00. While the tremendous number of applications for such permits in the past would, if maintained, produce fee revenues markedly in excess of Commission costs allocated to operator licensing activities, it is anticipated that the fee increase will operate to decrease the number of such applications. That, too, is a Commission objective since it appears that such permits have been obtained and used by holders for other than communications purposes.

55. Comments directed to the increase in fees for the restricted radio operator permit claimed that such increase was unreasonable, prohibitive, discriminatory or would affect "the safety offered by the shipboard radio installations." It is unlikely, however, that safety of shipboard radio installations could be affected by increasing the fee since the increase should not deter applicants for a lifetime permit who require it to operate shipboard radios.

56. One comment suggested that renewals of First and Second Class licenses be nullified in order to reduce workload. Upon examination of this proposal, the Commission has determined it is necessary to provide for renewal of such licenses in order to maintain administrative control, particularly in cases where behavior by the operator warrants consideration by the Commission as to whether the license should be renewed.

57. Authority for the adoption of the amendments herein is contained in Section 4(i) (47 U.S.C. § 154(i)) of the Communications Act, Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 483(a)), and Budget Bureau Circular A-25 and supplements thereto.

58. This proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX

Subpart G, Part 1 of Chapter I, Title 47 of the Code of Federal Regulations is revised to read as follows:

SUBPART G—SCHEDULE OF FEES FILED WITH THE COMMISSION

Authority: §§ 1.1101–1.1120 issued under sec. 501, 65 Stat. 290; 31 U.S.C. 483a unless otherwise noted.

General Information

§ 1.1101 Authority.

Authority for this Subpart is contained in Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) which provides that any service rendered by a Federal agency to or for any person shall be performed on a self-sustaining basis to the fullest extent possible. Title V further provides that the head of each Federal agency is authorized by regulation to prescribe such fees as he shall determine to be fair and equitable.

§ 1.1102 Payment of fees.

(a) *Filing fees.* Each application or notification by a CATV system under § 74.1105 filed on or after August 1, 1970, for which a fee is prescribed in this subpart, must be accompanied by a remittance in the full amount of the fee. In no case will an application or other filing be accepted for filing or processed prior to payment of the full amount specified. Filings for which no remittance is received, or for which an insufficient amount is received, may be returned to

the applicant. In the case of multiple applications for which a single check is drawn to cover all fees for the applications, it would be of great assistance to the Commission if a transmittal letter or notice were attached stating what fees are covered by the check.

(b) *Grant fees.* Grant fees should be accompanied by a transmittal advice identifying the purpose of the check. A copy of the Commission's notice of grant, which will specify the amount of the fee, will suffice.

(1) Where a grant fee is prescribed in the various services, the fee will be payable within 45 days after grant by the Commission. In the broadcast services, the grant fee, based on a percentage of the consideration, in assignment and transfer cases must be *transmitted* by the new licensee immediately following consummation of the transfer or assignment.

(c) *Annual fees.* The annual fee prescribed for broadcast stations must be submitted each year on or before the anniversary date of the expiration date of the station's license. The licensee shall file the station's rate card as of the preceding June 1 together with the amount of the annual fee. A new station first becomes liable for the annual operating fee at the time program test authority is granted. In the first year, the fee will cover the period from the date of program test authority until the next payment date (Example, if a station is in operation for seven full months prior to the next payment date, the fee is 7/12 of the annual rate).

(1) If a station has filed an application for renewal of a station license that will expire after July 31, 1970, any filing fee paid with the renewal application will be credited against the initial annual operating fee. Licensees should note that they are claiming this credit at the time they submit their rate card and pay their first annual operating fee.

(2) The annual fee prescribed for CATV systems must be submitted by April 1 for the preceding calendar year. A new CATV system becomes liable for the annual operating fee as of the date it begins to charge for service to 50 subscribers or more. In the first year of operation of the system, the fee will be computed based on the average of the number of subscribers being served on the last day of each full quarter of operation up to the end of the calendar year (Example, if a system is in operation on the last day of three quarters prior to the end of the calendar year, the average of those three last-day figures is to be used in computing the fee required). The fee will cover the number of full months of operation until the end of the calendar year, (Example, if a system is in operation for seven full months prior to the end of the calendar year, the fee is 7/12 of the annual rate).

(d) Fee payments received in the Commission's Offices in Washington, D.C., or in any of the Commission's field offices, should be in the form of a check or money order payable to the Federal Communications Commission. The Commission will not be responsible for cash sent through the mails. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483a).

(e) Receipts will be furnished upon request in the case of payments made in person, but no receipts will be issued for payments sent through the mails.

(f) Except as provided in §§ 1.1108 and 1.1104, all fees will be charged irrespective of the Commission's disposition of the application. Applications returned to applicants for additional information or corrections will not require an additional fee when resubmitted.

§ 1.1108 Return or refund of fees.

(a) The full amount of any fee submitted will be returned or refunded, as appropriate, in the following instances:

(1) Where no fee is required for the application filed.

(2) Where the application is filed by an applicant who cannot fulfill a prescribed age requirement.

(3) Where the application is filed for renewal without the reexamination of an amateur or commercial radio operator license after the grace period has expired.

(4) Where the applicant is precluded from obtaining a license by the provisions of section 303(1) or 310(a) of the Communications Act.

(5) Where circumstances beyond the control of the applicant, arising after the application is filed, would render a grant useless.

(6) When applications (accompanied by fees) are filed where not actually required by Safety and Special Radio Service rules (e.g., change of address, pro forma change of corporate name, etc.).

(7) When construction permit holders and licensees make non-substantive corrections in license grants within a period of 60 days from grant.

(b) Payments in excess of an applicable fee will be refunded only if the overpayment exceeds $2.00.

§ 1.1104 General exceptions.

(a) No fee is required for an application filed for the sole purpose of amending an authorization or pending application (if a fee is otherwise required) so as to comply with new or additional requirements of the Commission's rules or the rules of another Federal government agency affecting the authorization or pending application; however, if the applicant also requests an additional modification or the renewal of his authorization, the appropriate modification or renewal fee must accompany the application. Fee exemptions arising out of this general exception will be announced to the public in the orders amending the rules or in other appropriate Commission notices.

(b) No fee is required for an application filed by an alien pursuant to a reciprocal radio licensing agreement.

§ 1.1105 General Rule.

No filing fee is required for any application or request for special temporary authority (STA) or waiver in any service or for the grant of a STA or waiver of brief duration or minor character. Upon grant of an application or request for STA of an important character, the applicant will be notified to remit a fee in the following amount for the respective services.

Broadcast Services	$25.00
Common Carrier Services	25.00
Safety and Special Radio	5.00
Community Antenna TV	25.00

§ 1.1111 Schedule of fees for Radio Broadcast Services.

(a) Except as provided in paragraph (b) of this section, the fees prescribed below are applicable to applications and operations in the Radio Broadcast Services:

Construction Permits

Application for construction permit for new station or for major changes in existing station:

	Filing fee	Grant fee
VHF—top 50 markets [1]	$5,000	$15,000
UHF—top 50 markets	2,500	22,500
VHF—next 50 markets	2,000	15,000
UHF—next 50 markets	1,000	9,000
VHF—balance	1,000	9,000
UHF—balance	500	4,500
FM—class A	300	900
FM—class B and C	700	1,800
AM—day-50 kw	800	4,200
AM—day-25 kw	600	3,000
AM—day-10 kw	500	2,700
AM—day-5 kw	300	1,800
AM—day-1 kw	150	900
AM—day-500 w	50	450
AM—day-250 w [2]	25	225
AM—unlimited 50 kw	1,000	9,000
AM—unlimited 25 kw	800	7,200
AM—unlimited 10 kw	600	5,400
AM—unlimited 5 kw	450	2,700
AM—unlimited 1 kw	200	1,800
AM—unlimited 500 w	100	900
AM—unlimited 250 w [2]	50	450
AM—class IV	300	900
For directional antenna in addition to the above	50	450

[1] The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

[2] The fee for major changes in 100-w. operations is the same as for 250-w. operations.

Fees Schedule

Other Applications

The following fees shall accompany each application:

	AM	FM	TV	Auxiliary[1]
Applications filed on FCC Form 318 (where more than one broadcast station license is involved, the application must be accompanied by the total amount of the fees prescribed for each license so involved).	$220	$220	$220	No fee.
Application for construction permit to replace expired permit, FCC Form 321.[2]	$90	$90	$90	$30.
Application for modification other than a major change	30	30	30	
Application for change of call sign for broadcast station	100	100	100	
All other applications in the broadcast services	30	30	30	

[1] With respect to applications for remote pickup broadcast stations authorized under subpart D of part 74 of this chapter, one fee will cover the base station (if any) and all the remote pickup mobile stations of a main station, provided the applications therefor are filed at the same time.

[2] The $300 fee applies to construction permits for new stations or major changes in existing stations. An application to replace a construction permit for a modification other than a major change must be accompanied by a fee of $90 in all services.

Subscription Television

Application for Subscription Television Authorizations:

Application Filing Fee **$1,000**

Assignments and Transfers

Application for assignment of license or transfer of control, exclusive of FCC Form 316 applications (where more than one broadcast station license is involved, the total amount of fees prescribed for each license so involved will be paid in the manner set forth below):

Application Filing Fee ..... **$1,000.**

Assignment and Transfer fee to be paid immediately following consummation of the assignment or transfer. **2% of consideration for assignment or transfer.**

Annual License Fees

Each broadcast station shall pay an annual license fee to the Commission that is based on the station's rate card as of June 1 of each year.[3]

For AM and FM radio stations:

The annual fee will be a payment equal to 24 times the station's highest single "one-minute" spot announcement rate, but in no event shall the annual payment for each AM and each FM station be less than $52.00;

For television broadcast stations:

The annual fee will be a payment equal to 12 times the station's highest "30-second" spot announcement rate, but in no event shall the annual payment be less than $144.00.

(b) Fees are not required in the following instances:

(1) Applications filed by tax exempt organizations for the operation of stations providing noncommercial educational broadcast services, whether or not such stations operate on frequencies allocated for noncommercial educational use.

(2) Applications in the AM service requesting only authority to determine antenna power by direct measurement.

(3) All television translator applications.

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[3] In the first year of this fee schedule, a station's fee will be computed by taking the number of months from the effective date to the payment date divided by 12 times the full year annual fee. Stations beginning operation, pursuant to program test authority, after the license expiration anniversary date are liable for a pro-rata amount of the annual fee equal to the number of full months in operation from the date of program test authority to the payment date for the short period.

§ 1.1113 Schedule of fees for Common Carrier Services.

Applications filed for Common Carrier Services shall be accompanied by the fees prescribed below:

	Filing fee	Grant fee
DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE [1]		
Application for initial construction permit or for relocation of a base station, including authority for mobile units, blanket dispatch station authority,[2] and standby transmitters without independent radiating systems. [3] [4]	$100	$155.
Application for initial construction permit or for relocation of a dispatch station,[5] control station or repeater station. [4]	80	$75.
Application for modification of construction permit or license for base station, dispatch station, control station or repeater station at an existing station location.	25	$30.
Application for renewal of license for base station	25	$125.
Application for renewal of license for dispatch station, control station or repeater station.	10	$50.
Application for license, modification of license, or renewal of license for individual mobile stations per mobile unit.	80	None.
RURAL RADIO SERVICE		
Application for an initial construction permit or for relocation of facilities—central office.[4]	100	$100.
Application for modification of construction permit or license—central office.	25	$30.
Application for license for operation of a rural subscriber station at temporary-fixed locations.	10	$20.
Application for license or modification of license for individual subscriber stations.	5	$20.
Application for renewal of license rural subscriber station	25	None.
Application for renewal of license central office station	125	Do.
POINT TO POINT MICROWAVE RADIO SERVICES		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to existing points of communication or for relocation of facilities.[4] [6]	80	$180.
Application for license for operation of a station at temporary-fixed locations.	30	$100.
Application for modification of construction permit or license	30	$130.
Application for renewal of license	25	$100.
LOCAL TELEVISION TRANSMISSION SERVICE		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to an existing station location or for relocation of facilities.[4]	30	$130.
Application for license for operation of an STL station at temporary-fixed locations.	30	$100.
Application for license for operation of a mobile television pickup station	30	$100.
Application for modification of license	25	$75.
Application for renewal of license	25	$30.
INTERNATIONAL FIXED PUBLIC RADIOCOMMUNICATION SERVICES		
International fixed public station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station. [4]	150	$300.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter(s) being replaced if both applications are filed simultaneously).	75	$100.
Application for change of location of an authorized station	150	$400.
Application for modification of license	25	$100.
Application for renewal of license	100	$600.
International control station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[4]	100	$400.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter being replaced if both applications are filed simultaneously).	50	$250.
Application for change of location of an authorized station	100	$400.
Application for modification of license	25	$100.
Application for renewal of license	50	$100.
OTHER RADIO APPLICATIONS		
Application for assignment of an authorization or transfer of control (a separate fee is required for each call sign covered by the application).	10	$30.
All other common carrier radio applications	25	None.

See footnotes at end of table.

	Filing fee	Grant fee
SATELLITE COMMUNICATIONS SERVICES		
Application for initial construction permit for earth station	$50	$25,000.
Application for modification of construction permit for earth station	25	25.00.
Application for renewal of license—earth station	25	25.00.
Application for authority to construct and launch satellites	100	$100,000.
Application for assignment of an earth station construction permit or license or transfer of control of a licensee or permittee.	10	$50.
Application for communications common carrier for authorization to own stock in the Communications Satellite Corp.	25	$50.
Any other application filed under the Communications Satellite Act	25	$50.
COMMON CARRIER DOMESTIC APPLICATIONS		
Section 214 applications for construction of landline coaxial cable	100	$5 per route mile.
Section 214 applications to extend or supplement facilities by construction of radio facility or installation of carrier equipment on landline wire, cable or radio routes.	50	$6 per 1,000 equivalent 4 KHz channel miles authorized or fraction thereof.
Section 214 applications to lease facilities from other carriers (except overseas).	25	$4 per 1,000 equivalent 4 KHz channel miles authorized or fraction thereof.
Section 214 applications for overseas cable construction	1,000	$60 per route mile (nautical).
Section 214 applications to establish communication channels on overseas cables.	50	$10 per 1,000 equivalent 3 KHz channel miles authorized or fraction thereof.
Section 214 applications to lease overseas cable channels	50	$6 per 1,000 equivalent 3 KHz channel miles authorized or fraction thereof.
Section 214 applications to establish and operate satellite channels	100	$20 per equivalent 4 KHz channel.
Section 214 applications to lease satellite channels	50	$10 per equivalent 4 KHz channel.
Section 214 applications to discontinue, reduce or impair service to the public:		
Telephone companies	50	$50.
Telegraph companies	10	$10.
Cable landing license	100	$100.
Interlocking directorate applications	10	$40.
Section 221 applications	10	$200.
Tariff applications to change charges or regulations on less than statutory notice.	25	None.
All other common carrier domestic applications	25	Do.

[1] In this service each transmitter at a fixed location is a separate station notwithstanding the inclusion of more than one such station on a single authorization or under a single call sign.

[2] When included as part of a base station application, a request for blanket dispatch station authority made pursuant to the provisions of sec. 21.819(a) of this chapter does not require an individual application or fee. A request for such dispatch station authority filed separately from a base station construction permit application requires an application for modification of license and an appropriate fee.

[3] An application for a standby transmitter having its own independent radiating system requires the same fee as a base station application.

[4] No additional fee will be charged for applications for licenses to cover a construction permit unless there is a modification or variation of outstanding authority involved. In that event the appropriate fee for modification is applicable.

[5] This fee applies to any request for dispatch station authority not made pursuant to sec. 21.819(a) of this chapter.

[6] For applicants who propose to multiplex their radio systems and who make the supplementary showing required by sec. 21.706 of the rules in the lead application in lieu of filing a separate application under sec. 214 of the act, an additional grant fee will be payable at the rate of $6 per 1,000 equivalent 4 KHz channel miles, as prescribed in the schedule for sec. 214 applications to extend or supplement facilities.

§ 1.1115 Schedule of fees for the Safety and Special Radio Services.

(a) Except as provided in paragraph (c) of this section, the fees set forth in the schedule below shall accompany all formal applications for authorizations filed in the Safety and Special Radio Services:

Applications for all authorizations except as noted below	$20
Interim ship license including subsequent initial license	25
Operational fixed stations using frequencies above 932 MHz:	
Initial license and renewal	75
Assignment of license	75
Common Carrier Public Coast Stations:	
Initial license and renewal	75
Assignment of license	75
Amateur Service:	
Initial license, renewal and new class of operator license	9
Modification of license without renewal	4
Modification of license with renewal	9
Special Call Sign (plus other applicable fee)	25

(b) Except is provided in paragraph (c) of this section, the fees set forth below shall accompany the following applications or requests filed in the Safety and Special Radio Services:

Duplicate license	6

(c) *Fees are not required in the following instances:*

(1) Applications filed in the Police, Fire, Forestry-Conservation, Highway Maintenance, Local Government, and State Guard Radio Services.

(2) Applications filed by governmental entities in any of the Safety and Special Radio Services.

(3) Applications filed by the following in the Special Emergency Radio Service: Hospitals, Disaster Relief Organizations, Beach Patrols, School Buses, and nonprofit Ambulance Operators and Rescue Organizations.

(4) Applications filed in the Disaster Communications Service.

(5) Applications for ship inspections pursuant to the Great Lakes Agreement, the Safety of Life at Sea Convention, and Parts II and III, Title III, of the Communications Act of 1934, as amended.

(6) Applications for Novice Class license in the Amateur Radio Service, applications for amateur stations under military auspices, and applications filed in the Radio Amateur Civil Emergency Services (RACES).

(7) Operational Fixed Microwave Applications filed for Closed Circuit Educational Television Service.

(8) Applications for Civil Air Patrol Stations, Aeronautical Radionavigation Stations and for Aeronautical Search and Rescue Stations.

§ 1.1116 Schedule of fees for Cable Television Services.

(a) Applications, notifications and petitions filed in the Cable Television Services shall be accompanied by the fees prescribed below:

Applications in the Community Antenna Relay Service (CARS)

For a construction permit	$50
For a license or renewal	15
For a modification of construction permit or license	15

Petitions

For special relief (other than that specified below), pursuant to § 74.1109	25
For experimental operations pursuant to paragraph 51 of the December 1968 *Notice of Proposed Rule Making and Notice of Inquiry* in Docket 18397 (see, also, proposed § 74.1107(b) and (c) in Appendix C of that *Notice*)	25
For waiver of hearing re carriage of distant signals within the Grade A contour of a television broadcast station in a top-100 market:	
Per proposed commercial (a) VHF station or (b) network-affiliated UHF station, distant signal	25
Per proposed (a) educational station, or (b) independent UHF station, distant signal	10
Notifications pursuant to § 74.1105	10

(b) An annual fee shall be paid by each CATV system on or before April 1 of each year for the preceding calendar year. The fee for each system shall be equal to the number of its subscribers times 30¢. The number of subscribers shall be determined by averaging the number of subscribers on the last day of each calendar quarter. (See § 1.1102(c)(2).)

Note: Where a system offers bulk rates to multiple-outlet subscribers, such as apartment house or motel operators, such contracts are not viewed as individual subscriptions for purposes of fee determination. Rather, each such contract is viewed as a number of subscriptions, such number to be calculated by dividing the total annual-charge for that bulk-rate contract by the system's basic annual subscription rate for an individual household. (Thus, for example, if a CATV system charges an apartment house operator $1000 a year for a bulk rate contract and charges individual households a basic rate of $50 per year, the bulk rate contract is counted as 20 subscriptions (i.e., 1000÷50=20).) It is not contemplated, however, that such calculations should be made with respect to extra payments for additional CATV outlets within the same individual household.

§ 1.1117 Schedule of fees for commercial radio operator examinations and licensing.

(a) Except as provided in paragraph (b) of this section, applications filed for commercial radio operator examinations and licensing shall be accompanied by the fees prescribed below:

Applications for operator license:

First class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$5.00
Second class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$4.00
Third class permit, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$3.00
Provisional radiotelephone third-class operator certificate with broadcast endorsement—1 year term	$2.00
Restricted radiotelephone permit, new, duplicate, or replacement	$8.00
Restricted radiotelephone permit (alien)—1 year term	$2.00
Application for endorsement of license	$2.00
Application for verification card (FCC Form 758–F)	$2.00
Application for posting statement (FCC Form 759)	$2.00

(b) Whenever an application requests both an operator license and an endorsement, the required fee will be the fee prescribed for the license document involved.

§ 1.1119 Experimental Radio Services (other than Broadcast).

Fees are not required in the case of applications filed in the Experimental Radio Services (other than Broadcast).

§ 1.1120 Schedule of fees for equipment approval, acceptance or certification.

Type approval, type acceptance, certification or approval of subscription television systems shall require payment of fees as prescribed below.

Certification

Item	Filing fee	Grant fee
1. Application for certification of each receiver model:[1]		
(a) Television receivers	$10	$10
(b) FM receivers	10	10
(c) All others	10	10
2. Application for pretype certification of equipment operating under part 15	5	10
3. Request for modification of a certificated receiver with no change in model number:[2]		
(a) Television receivers	10	10
(b) FM receivers	5	10
(c) All others	5	10
4. Request for modification of a pretype certificated equipment operating under part 15 with no change in model number[2][3]	5	15

TYPE ACCEPTANCE

1. Application for type acceptance of each equipment type[2][4]	35	75
2. Application for the addition of one or more radio services to existing type acceptance for each equipment type as identified by manufacturer (or trade name) and type number	35	75
3. Approval of subscription television system	300	500

TYPE APPROVAL

1. Application or subscription for type approval:[5]		
(a) Part 73		
(1) Broadcast modulation monitors—SCA and stereo	100	100
(2) Broadcast modulation monitors—other	50	100
(3) Other broadcasting equipment	50	100
(b) Part 81		
(1) Ship transmitters including lifeboat transmitters	35	100
(2) Ship radar	100	150
(3) Ship radiotelephone shore stations	100	150
(4) Ship alarm radiotelegraph keyers	100	150
(5) Other radiotelephone devices	50	150
(c) Part 15		
(1) Wireless microphones	50	150
(2) Other low-power devices	50	75
(d) Part 18		
(1) Medical diathermy	100	150
(2) Diathermy	100	150
(3) Industrial ovens	100	150
(4) Medical ultrasonic	100	150
(5) Industrial ultrasonic	100	150
(6) Other ISM devices	50	150
2. Applications for modification of existing type approved equipment:[6]		
(a) Modifications which require retesting:		
(1) Part 73 and 81	50	50
(2) Part 15 and 18	25	25
(b) All other modifications	10	0

[1] A filing fee must be paid for each receiver which is part of a transceiver model or of equipment in which one or more receivers and transmitters are packaged on an individual unit and identified by a common equipment model number. The certification and accompanying fee must be submitted at the same time as applications for type acceptance of the associated transmitting equipment is made.

[2] A request for modification of a certificated equipment which involves a change in type (or model) number will be considered as an application for a new certification under Items 2 and 4 of this schedule.

[3] Applications for type acceptance of equipments which bear different identifications will be considered separate applications, regardless of whether such equipments may be otherwise identical.

[4] Fees for type acceptances are not required in the following cases:

(a) Where a request for type acceptance is included in an application for station license and covers only the items of equipment to be authorized in that particular station.

(b) Where a request is made by the licensee of a station for approval of modifications to a specific item or items of existing type accepted equipment authorized in that particular station.

[5] Applications for type approval of equipments which bear different identifications will be considered separate applications, regardless of whether such equipments may be otherwise identical.

[6] A request for modification of a type approved equipment which involves a change in type (or model) number will be considered as an application for a new type approval under Item 1 of this schedule.

STATEMENT OF COMMISSIONER KENNETH A. COX CONCURRING IN PART AND DISSENTING IN PART

I dissent with respect to the annual fees for broadcast stations. I would have exempted certain small stations from such fees. I concur in all the rest of the document.

F.C.C. 70-580

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FRONTIER BROADCASTING CO., CHEYENNE, WYO. For Renewal of License of Station KFBC-TV, Cheyenne, Wyo.	Docket No. 18797 File No. BRCT-318

MEMORANDUM OPINION AND ORDER

(Adopted June 3, 1970; Released June 8, 1970)

BY THE COMMISSION: CHAIRMAN BURCH DISSENTING; COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. In a Memorandum Opinion and Order, FCC 70-166, 21 FCC 2d 570, released February 26, 1970, we designated for hearing the application of Frontier Broadcasting Company for renewal of its license for VHF television station KFBC-TV, Cheyenne, Wyoming. At the same time, we dismissed for lack of standing, a petition to deny Frontier's application, filed by Cheyenne Enterprises, Inc. The dismissal was without prejudice to Enterprises' right to file an appropriate petition for leave to intervene. On March 30, 1970, Enterprises filed a petition for reconsideration. Comments on Enterprises' petition were filed on April 16, 1970, by the Broadcast Bureau, and an opposition was filed on April 22, 1970, by Frontier.

2. Enterprises' petition requests the reinstatement of its petition to deny and that we grant it standing to participate in his proceeding. It asserts that it will suffer injury from the grant of Frontier's application since Frontier will have monopolistic control over the media of mass communications in Cheyenne, and it will be eliminated as a potential competitor. Enterprises maintains that Frontier's concentration of control gives it standing to intervene in this proceeding as a "private attorney general" in order to insure that the disposition of Frontier's renewal application will be consistent with the public interest. To this end, Enterprises contends that our criteria for standing are overly restrictive and in conflict with recent court decisions.

3. Enterprises' petition to deny is a recitation of the allegations upon this proceeding is based and a request that Frontier's renewal application be denied. In the alternative it requests conditioning a grant to Frontier upon divestiture of its CATV interests.[1] The issues in this proceeding, in considering the concentration of control of the media of mass communications, encompass the question of whether

[1] The Commission has under consideration proposed rule making which would prohibit cross ownership of television broadcast stations and CATV systems within the stations' grade B service contours. *Notice of Proposed Rule Making and Notice of Inquiry*, Docket No. 18397, 15 FCC 2d 417, 426 (1968).

or not Frontier's joint ownership would serve the public interest. Accordingly, the request to reinstate the petition to deny is moot.

4. This proceeding was founded upon allegations which were originally raised by Enterprises in its petition to deny. Taking into account the particular circumstances, we believe that Enterprises is in a position to assist the Commission in determining whether or not the grant of Frontier's renewal application would serve the public interest. Therefore, without determining whether or not Enterprises has standing as of right to participate in this proceeding, in the exercise of our discretion, we are granting Enterprises standing to participate as a party.

5. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Cheyenne Enterprises, Inc. IS GRANTED, to the extent indicated herein, and in all other aspects IS DISMISSED, as moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 71-311

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter AMENDMENT OF SUBPART G OF PART I OF THE COMMISSION'S RULES RELATING TO THE SCHEDULE OF FEES	Docket No. 18802

MEMORANDUM OPINION AND ORDER

(Adopted March 24, 1971; Released April 1, 1971)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER HOUSER NOT PARTICIPATING.

1. The Commission has before it a number of Petitions for Reconsideration concerning various aspects of its fee schedule adopted July 1, 1970, with an effective date of August 1, 1970. (Report and Order, 23 F.C.C. 2d 880; 35 Fed. Reg. 10988).[1] In addition, there have been submitted to the Commission a request for a Declaratory Ruling,[2] a request for further review of certain aspects of the new fee schedule,[3] and a multitude of correspondence in the months since July 1 relating to individual items in the fee schedule as adopted, as well as to the general approach taken toward the different services. The Commission has reviewed fully all of the matters raised, both explicitly and implicitly, in the many submissions by these interested persons and the following paragraphs reflect our consideration of the various categories of questions raised. However, while all of the matters raised have been fully considered, we have not attempted to address ourselves to each and every comment and our treatment of these questions by categories encompasses consideration of all of the individual variations set forth in the separate comments.

2. Questions have been raised as to the legality and propriety of the fee schedule adopted by us, based on various contentions: that the fees set forth amount to taxation; that the Commission is not required

[1] Law Offices of Arthur Stambler, Law Offices of Morgan, Lewis and Bockius Leasco Corp., Bret Broadcasting Corp., et al., Steuben Broadcasters, Inc., et al., Radio Hopewell, Inc., Clay Broadcasting Corp. (Texas) et al., Mid-America Media, Inc. et al., Stoner Broadcasting Co., National Assoc. of Broadcasters, Joint Petition-Cole, Zalstra & Perrid, American Radio Relay League, California Citizens Band Assoc., Redwood Citizens Bandcers, Inc., Special Industrial Radio Service Assoc., Inc., Electronic Marine Products Chicago Area Radio Club Council Inc., RCA Global Communications, Inc., National Broadcasting Co., Inc., Communications Satellite Corp., Joint Petition-Twenty Miscellaneous Common Carriers, United States Independent Telephone Assoc., American Trucking Assoc., Inc., et al., West Texas Microwave Co., Law Offices of Wheeler & Wheeler, Oklahoma Broadcasters Assoc., the PHD Amateur Radio Assoc., Inc., and R. G. Galbraith, et al.

[2] Jointly filed by CBS TV Network Affiliates Assoc., NBC TV Network Affiliates Assoc., and ABC TV Network Affiliates Assoc. West Texas Microwave Co., Law Offices of Wheeler & Wheeler, and Oklahoma Broadcasters Assoc.

[3] The Oklahoma comments were filed on July 10, 1970. The comments were received too late for consideration before adoption. Since the comments raised were similar to those raised in the petitions for reconsideration, the Commission has included the pleadings in the scope of this Order. Additionally, a *Supplement to Joint Petition for Reconsideration of Increase in Common Carrier Fee Schedule* was filed by United Video, Inc., and several other communications have been received from individual members of the public.

to collect, by way of fees, its entire budget; that to establish such fees, the Commission improperly relied on only one criterion—value to the recipient; and that the activity costs set forth in the Report and Order are at variance with those supplied by the Commission to the Congress. While these comments present no new information or evidence which has not been considered by the Commission in connection with the adoption of the fee schedule on July 1, 1970, it may be useful to summarize briefly the legal basis and approach underlying the adoption of our fee schedule.

Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483(a)) provides that "any work . . . benefit, privilege, authority . . . franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency . . . shall be self-sustaining to the full extent possible and . . . each federal agency is authorized by regulation . . . to prescribe therefor such fee, charge or price . . . as [it] shall determine, . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served and other pertinent facts, . . .". After the authority of the Commission to establish fees in accordance with these statutory provisions was judicially upheld (*Aeronautical Radio, Inc.*, v. *F.C.C.*, 335 F 2d 304; *cert. den.* 379 U.S. 966), the then Bureau of the Budget regularly urged the establishment of higher fee schedules and the Congress called upon the Commission, in connection with its appropriations for fiscal year 1970, to increase its fees "to fully support all of its activities." (H. Rep. 91-316, June 19, 1969, pp. 7-8; Committee of Conference, H. Rep. 91-649, Nov. 18, 1969, p. 6). Both Houses of Congress have reiterated these views in connection with their separate consideration of the Commission's appropriation for fiscal year 1971. (H. Rep. 91-1060, May 7, 1970; p. 5; Sen. Rep. 91-949, June 24, 1970, p. 5). In arriving at the new schedule of charges, the Commission has given considerable but not exclusive consideration to its allocation of costs of Commission activities, as described in its Supplemental Notice in this Docket issued on March 4, 1970. This breakdown of activity costs is obviously not on all fours with that set forth in our budget request to the Congress since, for purposes of the fee schedule, the costs of overhead and support activities were broken down on a prorated basis and allocated to the bureaus whose activities are directly the subject of fees. Paragraph 4 of our previous Report and Order fully sets forth this approach and shows the relationship between Commission costs and projected fee revenues. When viewed in this light, it seems clear that the charges established in our fee schedule are clearly legal and within our authority to establish.

Effective Date of New Fee Schedule

3. Numerous questions have been raised concerning the effective date of the new fee schedule and its overall impact. The fee schedule adopted on July 1, 1970, was made effective as of August 1, 1970. Consequently, applications received by the Commission on or after August 1, 1970, are subject to the new schedule of application filing fees, and grants made by the Commission on and after August 1, 1970,

are, except as noted below, also subject to the new schedule of grant fees. The Report and Order establishing the new fee schedule was adopted on July 1, 1970, and released and generally published on July 2, 1970, although it was not printed in the Federal Register until July 8, 1970. However, in accordance with the provisions of Section 4(c) of the Administrative Procedure Act, 5 U.S.C. 553(d), paragraph 10 of the Report and Order sets forth in some detail the reasons why the fee schedule was being made effective as of August 1, 1970, less than 30 days after its publication in the Federal Register. We believe that this action is in compliance with the provisions of applicable law and should remain undisturbed.

4. While making the new fee schedule effective as of August 1, 1970, we determined to exempt grants made on or after August 1, 1970, if the application for such grant had been filed with the Commission prior to July 1, 1970, the date of adoption of the new fee schedule. We stated in paragraph 11 of the Report and Order that application processing during the month of July would proceed on a normal basis and that action on applications would not be held up because of the imminence of the August 1 date. We also established this limited exemption in order to eliminate any claim that action on matters filed prior to the date of adoption of the new fee schedule might be delayed until on or after August 1, 1970, so as to be able to exact the new grant fees. Viewed in this light, it is clear that assertions by various petitioners of improper retroactive application of the new fee schedule are without foundation. In no instance is the newly established schedule of fees applicable to any grant which is made prior to August 1, 1970. Thus, what the parties are, in effect, contending is simply that the exemption from the new fee schedule made by the Commission with respect to grants on or after August 1 based on applications filed prior to July 1, 1970, should be enlarged and expanded so as also to exempt grants based on applications filed on or after July 1, 1970, and up to and including August 1, 1970. It is proposed by various parties to enlarge the exemption by changing "prior to July 1, 1970" to such dates as "prior to close of business July 1, 1970", "July 2, 1970", and finally "August 1, 1970". In each instance, it appears that the new exemption date proposed would, if adopted by the Commission, eliminate the grant fee in a particular matter in which the contending party is involved.

5. Apart from the individual benefits sought, however, there appears to be no basis for a change in our action in this regard. No claim of surprise as to the adoption of the new fee schedule can properly be made, since the Notice of Proposed Rule Making had been issued in February 1970, four and one half months prior to July 1, 1970, and since the Commission's representations to the Congress that a new fee schedule would be adopted by the beginning of fiscal year 1971 had been widely reported. Further, it must be recognized that while these comments have come, in the main, from the broadcast industry, the matter of separate grant fees involves not only broadcast services but also the common carrier services and our equipment approval actions. To now enlarge upon the exemption heretofore made would not only constitute a departure from the sound basis upon which the limited exemption was grounded, but *would also be inequitable with respect to*

the many applications which were filed on or after August 1, 1970, but which could have been filed prior to that date had the applicant been aware that the earlier filing would result in a saving of the grant fee. We remain of the view that the action previously taken does not constitute a retroactive application of the newly established schedule of grant fees and that the limited exemption provided heretofore rests upon a sound foundation. We find no reasonable grounds for now enlarging upon this exemption.

6. One additional point requiring reiteration concerns paragraph 11 of the Report and Order in which the Commission stated that applications received on and after August 1, 1970, would be subject to the new fee schedule. Some applicants have, by letter, complained because their applications were postmarked prior to the effective date but were not received in the Commission's offices until after the effective date of the new fee schedule. Such applications have been routinely returned with a notice pointing to the insufficiency of the fee tendered. Normal Commission rules and practices regarding time of filing of documents refer uniformly to the date the document is "filed with the Commission," i.e., received at the Commission's offices. Consequently, the action by the Commission with regard to those applications is in keeping with its normal course of business, and no departure therefrom is justified herein.

Impact of New Fees on "Small Business" Licensees

7. In commending the Commission on its proposed fee schedule, the Senate Appropriations Committee in its Report of June 24, 1970 (Sen. Rep. 91-949) urged the Commission to proceed with caution "in order to insure that the new fees will be equitable in every respect and will not make operations prohibitive or unduly burdensome for the smaller licensees, and in particular, those located in the less populated areas of our country." In addition, the National Association of Broadcasters, in its petition for reconsideration, while recognizing the difficulties in establishing hard and fast levies for exemption of small broadcasters from the annual operating fee, urged the Commission to adopt a liberal waiver policy on an ad hoc basis. The Commission is, of course, deeply concerned with this matter and we have no intention of maintaining fees at such a level as to make their cost prohibitive for persons who seek or who have licenses and are otherwise qualified to be Commission licensees. In this regard, particularly, the Commission will direct its continuing review of all individual charges and will make such revisions and changes as seem to be equitable and warranted in the circumstances.

8. With respect to the broadcast services, we would reiterate our previously stated view that the new fees will not be prohibitive or unduly burdensome to the small station owner. Under the old fee schedule, AM and FM licensees paid a filing fee of $75 for renewal applications which were filed every three years. This has now been eliminated, and, by contrast, the minimum annual operating fee for existing AM and FM licensees of $52 under the new schedule reflects an increase in fees of but $27 per year as against the old schedule. Further, the new schedule establishes an annual operating fee for AM

and FM licensees at a level which is twenty-four times the station's highest single one-minute spot rate. Thus, stated another way, the annual fee is equivalent to the price of but two one-minute spot announcements per month out of the substantial number of commercials which an AM or FM station carries each month. Similarly with TV stations, the old schedule established a fee of $150.00 at license renewal time. When compared to this figure, which is equivalent to $50 a year, the new schedule setting forth a minium annual fee of $144 cannot be said to be an unduly onerous or prohibitive increase. Also, the annual fee for TV stations is equivalent to twelve times the station's highest 30 second spot announcement—this being equal to the price of only one 30 second spot announcement per month out of the large number of commercial announcements which the average TV station broadcasts each month.

9. The Commission is keenly aware of the significant number of unprofitable broadcast stations and of the contention that the annual operating fees would cause a diminution of program services by broadcast stations, particularly in marginal and unprofitable stations. We would emphasize, however, that no evidence has been submitted in support of these assertions, and that since all broadcast licensees have established financial qualifications sufficient to carry on their broadcast operations, it is highly unlikely that the new fee schedule would constitute a significant burden in a broadcast station's total operation. Further, as we emphasized in our previous Report and Order, while a station's spot rate may not be a precise index of value of the station's license, it is a figure determined upon by the licensee in his own best judgment. And any licensee claiming that the rate card in effect on June 1 (which is to be filed with the Commission as a basis for computing annual fees) is not reasonably descriptive of its yearly average, may petition for the filing of a more appropriate rate card. The Commission will, of course, maintain a continuing review in this area, and if the facts indicate a change is necessary, appropriate revisions will be made. Meanwhile, any broadcast licensee whose financial situation is such that the annual operating fees will cause a diminution of program service to the public, or otherwise materially affect his operation, may petition the Commission for a waiver of the annual operating fee for a given period, and show good cause for the relief requested.

10. Several petitioners have pointed out and protested an apparent inconsistency in the fee schedule between the Common Carrier Services and Safety & Special Radio Services with respect to the treatment for fee purposes of mobile stations and multiple transmitters. In general, the schedule for Common Carrier Services established fees on a per station or transmitter basis, while in the Safety & Special Radio Services fees were established on a per application basis without regard to the number of units covered by the application. This inconsistency stems in large measure from differences in the application procedures in the different services. While Safety & Special Radio Services procedures permit the inclusion of a number of mobile units or separate transmitters in one application form, the Common Carrier Services procedures generally require separate applications for each unit. We are in accord with petitioners' view that this inconsistency should be eliminated and that a common approach in principle should be taken

in both types of services. We further believe that the approach now reflected in the Common Carrier fee schedule should be generally adopted. Since the size of a communications systems is often reflected in the number of units or transmitters involved, fees based upon this approach should better reflect "value to the recipient" of the Commission's authorizations in these services. In addition, this approach may operate, particularly in the Land Mobile service, to limit the number of units applied for to the number of units actually required for use in a system, thus enhancing the reliability of our data concerning the actual use of licensed facilities. We, therefore, are denying the petitions for reconsideration in this regard and will issue in the near future a Notice of Proposed Rule Making looking to the adoption of such changes in the fee schedules of these services as are necessary to accomplish a common approach to the establishment of fees.

11. In the fee schedule adopted on July 1, 1970, a fee was established for the grant of applications for assignment of license for, and the transfer of control of broadcast facilities. The grant fee so established was described as "two percent of consideration for assignment or transfer". As we stated in Paragraph 22 of the Report and Order, "The Commission is well aware of the difficulty of computing the consideration in cases where cash or other ascertainable market value is not specified." Our experience during the past eight months has reflected this difficulty and we therefore urge that the parties to such transactions, where the consideration is not specified in cash, submit to the Commission with their application their own estimate of the dollar value of the consideration involved in such assignment or transfer. This should be material assistance to the Commission [4] since, as we have already stated, "there is consideration to support the assignment or transfer in all cases, and the amount of the consideration is therefore a question of fact". In this connection, we have in Paragraph 44 herein, adopted one change with respect to consultant and noncompetition agreements which should simplify the determination of consideration in such cases.

COMMON CARRIER SERVICE

Domestic Public Land Mobile Radio Service

12. The American Trucking Association, Inc., and the American Movers Conference have petitioned for reconsideration of that portion of the Commission's Report and Order which prescribes the filing fee on a per unit basis, rather than on a per application basis as formerly, for applications for license, modification of license or renewal of license for individual mobile stations. As indicated in Paragraph 10 above, we believe this approach is proper and we propose to adopt it for the Safety and Special Radio Services also. These organizations also point out that individual motor carriers hold many DPLMRS mobile station licenses authorized in a single multiple unit application, and contend that the $50 fee per unit is excessive, burdensome and without justification. Examples of multiple unit authorizations cited include 2500 units held by Aero-Mayflower, 500 units by Atlas Van Lines and 400

[4] However, because of the aforesaid difficulties, we are also considering other means of determining grant fees in such cases.

units for United Van Lines. Other companies are listed as about to apply for several hundred mobile station licenses each. Petitioners contend that the cost of obtaining the initial multiple unit license and every five years thereafter at renewal time will place a damper on this type of use of radio to the detriment of the public served by the motor carriers involved and the common carriers who provide service to them. While recognizing that the cost to the government of issuing an authorization is not the sole or decisive consideration, the petitioners aver that the value to the recipient should be counterbalanced against public policy and interest served by making common carrier mobile communications available to the motor carrier industry without the "exorbitant and burdensome" filing fee imposed. Complaints have also been received from single licensees directed against the amount of the fee for individual mobile station authorizations.

13. While recognizing that the present schedule imposes sharply increased fees for mobile stations, we do not feel that the $50 per unit is excessive for single unit applications, in view of the cost of processing such applications and the value of the authorization to the recipient. However, we agree with the petitioners that the cost of processing an application does not increase in proportion to the number of mobile units requested. We are, therefore, modifying the fee schedule to prescribe the $50 filing fee for only the first mobile unit requested in the application, with each additional unit covered by the application being subject to a fee of $30.

Point-to-Point Microwave Radio Service

14. The West Texas and "Joint Petition" challenge the equity and fairness of the grant fee prescribed for modification of construction permits or licenses in the point-to-point microwave radio service in Section 1.1113 on the grounds that the combined fee of $200 ($50 filing and $150 grant) is excessive for the many relative minor modifications involved. The addition of audio services at an average construction cost of $400 is cited as an example where the $200 fee represents an unreasonable and burdensome assessment. Furthermore, the petitioners contend that most applications for license modifications and modifications of construction permits involve only minor engineering changes with little processing cost to the Commission, and cite as examples the correction of coordinates of a station location, change of polarization or azimuth, addition or deletion of subcarrier channels, change of emission or authorized output power, antenna changes and the like. Additionally, it is pointed out in the pleadings that only a $50 fee is prescribed in the Radio Broadcast Service for similar modifications.

15. We believe that this complaint has merit and that the fee schedule should reflect a distinction between major and minor modifications of construction permits or licenses in the point-to-point microwave radio service. We are, therefore, amending this part of the Common Carrier fee schedule so that modifications and changes other than those specifically listed in this part of the schedule shall be subject to an application filing fee of $25.00 and a grant fee of $25.00.

16. Petitions for reconsideration directed against the Satellite Communications schedule were received from RCA Global Communications, Inc., Communications Satellite Corporation, and, jointly, CBS, NBC and ABC Television Affiliates Associations, respectively. All of the petitioners request reconsideration of the $50,000 flat fee for the initial construction of satellite earth stations, essentially on the grounds that the fee is excessive for all but major earth stations. The petitioners contend that the fee schedule as applying to earth stations should recognize the diversity in type, size and cost of such stations that may be required for domestic satellite system or for special satellite common carrier communication purposes in the future. All recommend a percentage of construction cost approach, with RCA suggesting 1%, ComSat ½ of 1% and the Television Associations 2%, with a maximum of $50,000 as an appropriate measure of the fee to be assessed for each station. Communications have also been received from Senator Gravel of the State of Alaska and others requesting that some provision be made in the schedule of fees to recognize the predicted growth of small and relatively inexpensive earth stations.

17. ComSat also protests the $100,000 fee prescribed for satellite construction and launch, unless it was intended by the Commission that the fee would cover an entire satellite program, regardless of the number of satellites involved, and suggests a fee of $10,000 as appropriate for each operational satellite. Further, ComSat suggests that fees associated with satellite construction should be assessed only upon satellites which are successfully emplaced in orbit and which prove capable of providing commercially acceptable service. Additionally, this carrier recommends that the grant fee for applications filed under Section 214 of the Act for authority to install GCE and multiplex equipment at earth stations be assessed against the cost of the equipment to be installed, in lieu of the present flat fee per channel established, and suggests ½ of 1% of such cost as appropriate.

18. We believe that the revised schedule adopted herein will satisfy these objections, and will take into account the differing circumstances that may pertain to domestic satellite systems. Specifically, the grant fees for earth stations and satellite constructions generally are to be based on a percentage of construction cost as set forth in the application. For applications for initial construction permit for satellite construction, a relatively nominal flat grant fee is established, with the major grant fee based on a percentage of construction cost, to be assessed after the satellite is successfully launched and capable of commercial operation. The change recommended by ComSat with respect to Section 214 applications is being made in the nonradio section of the schedule.

19. One further point concerning applications for space and earth stations in a domestic satellite system warrants mention. In its *Report and Order* in Docket No. 16495 (22 FCC 2d 86) the Commission decided to consider the issues in that proceeding in the context of concrete applications for authorization of such facilities and invited applications for systems in the 4 and 6 GHz bands, and in a further Notice of Proposed Rule Making in that proceeding, issued Septem-

ber 26, 1970, the Commission invited the submission of alternative system applications proposing higher frequencies. The Commission has accepted for filing an application submitted by Western Union (Public Notice FCC 70-953), and has provided a cut-off date of March 1, 1971, for the filing of applications to be considered in Docket No. 16495 in conjunction with Western Union's application (FCC 70-953). While labeled "applications", such filings are in essence comments on the issues in the Inquiry and Rule Making Proceeding and our invitation for the submission of varied applications reflected the Commission's view that it could best decide the issues in this proceeding with the assistance of information submitted in application form. Under these circumstances, we believe that the imposition of the normal application filing fees would be inappropriate for such submissions. Therefore, while the established grant fee will be applicable to any authorization of facilities for domestic satellite systems, applications for such facilities filed in accordance with the Commission's invitation will not be subject to application filing fees.

20. In addition to the changes noted above, two items have been added to the schedule to identify more clearly the proper fee category for auxiliary station applications, and some minor clarifying language modifications have been made in other fee item descriptions.

Common Carrier Nonradio Applications

21. As recommended by ComSat to conform with the treatment of earth station construction in the satellite communications schedule, we are prescribing that the grant fee for Section 214 applications to establish and provide channels of communication at an earth station via satellite shall be based on a percentage of construction cost, in lieu of a flat charge per channel. In this connection, we are separating Section 214 applications to establish and provide channels of communication via satellite, where no additional construction or installation of equipment is required, and prescribing relatively nominal flat filing and grant fees for these requests.

22. Footnote 9 has been added to the schedule to specify that construction projects undertaken pursuant to grant of continuing authority as permitted in Section 63.03(c) and Section 63.04(c) of the Commission's Rules are subject to the grant fee.

Safety and Special Radio Services

23. Numerous petitions for reconsideration were directed to that part of the revised fee schedules dealing with the Safety and Special Radio Services. In addition, the Commission has received many letters and comments of a less formal nature both before and after the time for filing expired. All this information, to the extent pertinent and relevant, has been included in our consideration of these matters. A letter from the Electronic Industries Association and petitions submitted by R. G. Galbraith, et. al., the California Citizens Band Association, Inc., and the Redwood Citizens Banders, Inc., stated that the grouping together of the bulk of Safety and Special licensees did not show the distinction between the various users, i.e., commercial as

against non-commercial, and that a distinction along these lines should be reflected in the fee schedule. Additionally, it was claimed that many Citizens Band licensees would elect to operate on an unlicensed basis rather than to pay the new fees. It was also stated that the increase in fee revenues should result in new enforcement programs.

24. With respect to making a distinction, in terms of fees, between commercial and non-commercial uses of authorized facilities, it should be noted that such a distinction is already reflected in the fee schedule for the Amateur Radio Service (with lesser fees) and for governmental entities using radio facilities (which are exempt from fees). Moreover, no fees are charged for applications filed in the Special Emergency Radio Service by hospitals, disaster relief organizations, beach patrols, school buses, and non-profit ambulance operators and rescue organizations. Similar exemptions are provided for applications related to Closed Circuit Educational Television Service, Civil Air Patrol Stations, Aeronautical Radio-navigation and Search and Rescue Stations and to the Disaster Communications Service. To make further distinctions for fee purposes would, at the present time, present considerable administrative difficulties. For example, in the Citizens Service a licensee is permitted to use the same licensed facilities for business purposes, for substantive personal purposes, and for a combination of these two. Likewise, in the Business Radio Service, eligibility is open to both profit-making and non-profit making enterprises. We, therefore, will make no changes in the fee schedule at the present time to reflect any further distinctions between commercial and non-commercial uses of licensed facilities. However, the Commission is regularly engaged in a continuing review of the fee schedule and the comments of these petitioners in this regard will remain under consideration.

25. The contention that increased unlicensed operation in the Citizens Band would result from the higher fees is hardly worth mentioning. The fact that a prospective licensee would operate illegally rather than pay a fee cannot seriously be considered as a factor against continuing that fee in effect. And there is no evidence to support the contention as to any increase in illegal operation.

26. Insofar as the subject of an expanded enforcement program is concerned, the Commission regularly weighs the need for such activities, together with all other demands on the Commission's time and efforts, and we will continue to do so. It should be noted in this connection that all fee revenues must be turned over to the general funds of the U.S. Treasury and that no part of the fee revenues is retained by the Commission. Our annual budget and appropriation provide both the source of funds and limitations on their expenditure with respect to all activities of the Commission.

27. The Special Industrial Radio Service Association, Inc., (SIRSA) claims that the Commission did not address itself to the original objections to the new fees made to the Commission by SIRSA and, therefore, reiterates them. These include the contentions that the general tax revenues should be utilized for part of the costs of the Commission's activities; that the S&SRSB fee revenues will be in excess of its fair share of the Commission's budget; that the fees for renewal should be less than those established for initial applications; and that

the value of S&SRSB licenses has not been adequately determined. Since these contentions have been fully considered by the Commission previously, in Paragraphs 4–5 and 38 to 43 inclusive of the Report and Order issued July 1, 1970, no useful purpose would be served by repeating our response thereto. We have the same comment with respect to the contentions of the Electronic Marine Products Association that the new fees constitute an unnecessary tax on safety equipment.

28. Three petitioners, the American Radio Relay League, Inc. (ARRL), Chicago Area Radio Club Council, Inc. (Chicago), and the PHD Amateur Radio Association, Inc. (PHD), were concerned with the Amateur section of the fee schedule. The ARRL contends that the impact of the new fees may be so severe as to bring about a decrease in the number of amateur radio operators. ARRL also asserts that the "hundreds of comments" supplied by the Amateurs were ignored because no mention was made of them in the Report and Order adopting the new schedule. The Commission is of the opinion that the ARRL has not demonstrated that the imposition of generally modest fees will have the impact predicted by the League. Concerning the complaint that the Amateurs' comments were ignored, we can only reiterate that the comments were read and considered; notwithstanding that the text of the Report and Order failed to identify each and every comment, there is no reason to conclude that they were ignored. The Chicago and PHD petitions proposed exemptions for various categories of Amateur licensees. Chicago also proposed the waiving of fees for re-examinations for licenses in the Amateur Radio Service after failure to pass the examination on which the original fee had been paid. We believe that the fee exemptions and waiver proposed by Chicago and PHD are not adequately supported by factual showings. To carry out the requested exemptions and to provide for the waiver request would not be in the public interest, since the fees are nominal and modest permitting an Amateur to operate for five years. We are, therefore, denying the petitions of the ARRL, Chicago and PHD.

29. Our attention has also been invited to an oversight which requires correction in the fee schedule for operational fixed stations using frequencies above 952 MHz. Such facilities include, among other things, microwave stations which serve CATV systems and which are authorized for a five year term in the Business Radio Service, and the present schedule calls for a fee of $75. While we have been endeavoring to shift CATV microwave systems to the CARS service, the date by which such systems are required to vacate the Business Radio Service was recently extended to February 1, 1976. At the same time, the Commission, in Docket No. 18916, adopted rules requiring Business Radio Service licensees of such systems to file renewal applications every year rather than every five years, which is the general rule for such service. The difference in fees between BRS and CARS reflects both the broader authorization and longer license term in the former and the lesser fee for CARS systems becomes applicable when a BRS licensee shifts to that service. While we believe it inappropriate to change this difference in fees, it would be equitable to adjust the renewal fee in the BRS on a pro-rata basis to $15 for the filing of annual renewal applications.

CATV

30. A "Joint Petition for Reconsideration" has been filed on behalf of approximately 200 existing or currently proposed CATV systems, directed against the CATV portion of the new fee schedule (Section 1.1116 of the Rules). Petitioners argue that the schedule is inconsistent with the "fair and equitable" standard of 31 U.S.C. Section 483(a), in that CATV systems have derived little benefit from the current CATV regulatory scheme, which they allege is primarily for the benefit of the broadcasting industry. Petitioners assert that recent rule making proposals in Docket 18397–A indicate that the Commission now embraces the concept of CATV developing as a nationa broadband communications system, and concede that the fee schedule as adopted may be justifiable for such a "truly constructive regulatory scheme." Hence, petitioners urge that we suspend and defer implementation of Section 1.1116 of the Rules until final approval is given to the pending rule making proposals. At that time, it is argued, the Commission will be able to implement the fees necessary to administer the new program. Underlying petitioners' arguments is the premise that a fee schedule must be commensurate with benefits conferred by regulation. But, as we have said and as the statute makes clear, "value to recipient" is but one of the factors to be considered by the Commission in establishing "fair and equitable" fees. Petitioners have advanced no new considerations which would justify a change in our action establishing fees for CATV systems as of August 1, 1970.

31. One specific change in the fee structure is suggested by petitioners, namely, that the fee for petitions for special relief which invoke the mandatory stay provision of Section 74.1105(c) of the Rules should be reestablished at $300, in order to discourage broadcasters from abusing the provision with frivolous pleadings interposed for delay. We have already considered the advisability of imposing a $300 fee and have concluded that such a large amount would be likely to discourage the filing of petitions which may draw attention to situations requiring remedy. There being no new arguments presented, we see no reason to reconsider our judgment.

32. The National Association of Educational Broadcasters filed a request for clarification of the applicability of Section 1.1116 of the Rules to non-commercial educational tax-exempt organizations, some of which are allegedly considering ownership and operation of CATV systems. Consistent with the fee provisions for other regulated services, no fee is contemplated under Section 1.1116, where, pursuant to Section 74.1109 of the Rules, a non-commercial educational broadcast station files an objection to a CATV system's proposed carriage of a television signal. We are amending Section 1.1116 accordingly.

33. Footnote 12 of the Report and Order adopted on July 1, 1970, implies that payment of the CATV annual fee should accompany the filing of a CATV system's annual financial report, if such a report is required as a result of the proceedings in Docket No. 18397. The financial reporting aspect of Docket No. 18397 has not yet been concluded. In the interim and in order to simplify calculation of the appropriate fee, the Commission has issued FCC Form 326–A (Computation of CATV Annual Fee) which must be filed on or before April 1 of each

year.[5] Since Commission CATV records are kept on a community basis, a separate Form 326-A, with appropriate annual fee attached, must be filed for each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by CATV facilities, even if there is single head end and identical ownership of facilities extending into several communities.

34. In the course of administering the CATV fee schedule, it has become apparent that certain clarifications and editorial changes are required. We have discovered that, in many instances, a single filing fee has been paid for a notification pursuant to Section 74.1105 of the Rules concerning groups of CATV systems in nearby communities which share a common head end and have identical ownership of CATV facilities. Accordingly, we are adding a note to Section 1.1116 of the Rules to clarify our intention that the same principle should apply to Section 74.1105 notification fees that applies to our determination whether a CATV system lies within a given signal intensity contour of a television station—namely, that a fee is required for each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by a CATV system, even if there is a single head end and identical ownership of facilities extending into several communities. See e.g., *Telerama, Inc.*, 3 FCC 2d 585; *Mission Cable TC, Inc.*, 4 FCC 2d 236.

35. Finally, we note that clarification is needed concerning fees for waiver petitions when it is proposed, in a single petition, to carry distant signals into more than one community located within the predicted Grade A contour of a television broadcast station in a top-100 television market. Although we have previously indicated that, for the purpose of Section 74.1105 notification fees, a separate fee is required for each community involved, we believe that such a provision would be too onerous in the context of assessing fees for the importation of distant signals into communities having a common head end and identical ownership of CATV facilities. Therefore, we are also adding a note to Section 1.1116 of the Rules to make clear that for purposes of distant station fees only, if the communities involved in a single petition are served by CATV facilities having a common head end and identical ownership, only a single set of station fees is required for all of the communities (rather than a set of station fees for each community mentioned in the waiver petition).[6] Likewise, only a single fee will be required if a waiver petition is supplemented to add an additional distant signal, and no fee will be required if the name of a community having a common head end and identical ownership of CATV facilities with those of previously named communities in a waiver petition is added to that petition.

Broadcast Services

36. Arguments concerning the authority of the Commission to adopt the fee schedule, the impact of the effective date, and waiver of fees

[5] The Commission has extended the time for filing the CATV annual fee for the 1970 calendar year to May 1, 1971.

[6] I.e., if a waiver petition also serves as a Section 74.1105 notification, a separate $10 fee will be required for each community involved, even though only a single set of station fees will be due for all of the communities.

have been discussed above. This part of the Memorandum Opinion and Order will, therefore, deal only with other matters raised in the petitions for reconsideration and with problems which have arisen in administering the new fee schedule with regard to broadcast services.

37. *Annual License Fee.* The annual license fee is based on the rate card of the station. Paragraph 26 of the Report and Order stated that for AM and FM stations having a joint AM–FM rate, the payment of a single fee based on the highest one-minute joint rate would suffice to cover the operations of both stations and it would not be necessary to allocate part of the joint fee to AM and part to FM and pay two fees. Similar provision was made as to parent-satellite television stations with joint rates. It now appears that some AM–FM operations have both joint rate cards and separate rate cards, and that this is also true for some parent-satellite TV operations. Thus, for example, an AM–FM operation may have joint rates for "drive time" and separate rate cards for other periods of the broadcast day. In such situations, separate fees must be paid by the licensee—one for the AM station based on its rate card and one for the FM station based on its rate card. Similarly, where there are separate rate cards in parent-satellite TV operations, separate annual fees must be paid.

38. Section 1.1111 of the fee schedule provides that each broadcast station shall pay an annual license fee. Section 1.1102(c) requires that these fees be paid on or before the anniversary date of the expiration date of the station's license. It also provides that new stations become liable for the fee when they are granted program test authority and that in the first year, the fee will be pro-rated to cover the period between the date of authorization of program test authority and the next payment date. Questions have arisen as to whether this language means that a permittee operating under program test authority must pay the annual fee at the next payment date for licensees in his State even though it is a permittee and not a licensee, or whether it is not liable for the fee on the next payment date if it has not yet received a license to cover its construction permit. The intent of Section 1.1102(c) [now redesignated 1.1102(e)] is the former, *i.e.*, any operating station, whether operating under a license or a permit with program test authority, must pay the annual fee, on the date generally applicable to stations in its State.

39. Paragraph 11 of the Report and Order stated that in the first year under the new fee schedule which became effective August 1, 1970, the annual fees for broadcast stations would be pro-rated over the number of full months of operation beginning August 1, 1970. However, some licensees, on their anniversary dates occurring since the fee schedule became effective, have submitted fees for a full year of operation rather than for the number of months of operation between August 1, 1970, and the anniversary date. Such overpayments will not be refunded but will be credited to any future fees—annual operating fees or other fees—that become due for the station.

40. *Construction Permits for TV Stations—Market Ranking.* The fee schedule provides that grant fees for construction permits for new TV stations or for major changes in existing TV stations shall vary, depending on whether the station is located in the top 50 markets, the next 50 markets, or the remaining markets. Market rank

is determined by the rating of the American Research Bureau (ARB) on the basis of the net weekly circulation for the most recent year. Inasmuch as the ARB no longer regularly ranks markets in this fashion, the rule will be amended to specify use of ARB market ranking, for the most recent year, based on prime time households (average quarter-hour audience during prime time, all home stations)—a method presently used by ARB for ranking. The ARB "Television Market Analysis" which contains the market rankings is issued about May of each year. While Section 1.1102(b) [now redesignated 11.1102(d)] of the Rules provides that grant fees are payable within 45 days after the grant is made, the amount of the grant fee that is payable is determined by the market ranking in effect on the date of the grant. Similarly, the amount of application filing fee which is payable is determined by the market ranking in effect on the date the application is filed.

41. *Exemptions from Certain Assignment and Transfer Fees.* Comments in this proceeding suggested that applications for assignment or transfer occasioned by rules that might be adopted in Docket No. 18110, requiring divestiture on the part of licensees holding multiple media in the same market, should not be assessed fees. Paragraph 23 of the Report and Order issued on July 1, 1970, indicated that Section 1.1104 would guide the Commission in such cases. It should be noted that rules requiring divestiture have been proposed in a Further Notice of Proposed Rule Making in Docket No. 18110, 22 F.C.C. 2d 339 (1970). Whether or not the proposal will be adopted is a decision yet to be made in that proceeding.

42. The National Association of Broadcasters, in its petition for reconsideration, urges a broader exemption with regard to applications related to actions taken in Docket No. 18110. It is the view of NAB that if the Commission is willing to issue a tax certificate in assignment and transfer cases, as set forth in our Public Notice, FCC 70-774, July 16, 1970, it would be consistent not to require payment of the applicable fees in such cases. We would point out, however, that Section 1.1104 of our Rules relates, among other things, to applications which are filed in order to achieve compliance with new or additional requirements of the Commission's Rules and that the rules adopted to date in Docket No. 18110 do not require divestiture by any licensee of existing facilities. We are of the view therefore that there is no present warrant for adoption of the NAB proposal.

43. In Paragraph 31 of our Report and Order issued on July 1, 1970, we indicated that we had received some specialized comments requesting exemption from fees for broadcast stations operated by tax-exempt organizations on a non-commercial basis even though the station was not classified as an educational station. Because of various questions not then resolved, we stated that we were not prepared to establish such an exemption but would keep the matter under study. We adhere to that position insofar as a general exemption for non-commercial stations is concerned. However, we are persuaded to the view that the fee exemption presently provided in the Safety and Special Radio Services for local governmental entities which operate stations in such services (which by definition is on a non-commercial basis) should, by analogy, be applied to the broadcast

services. We are, therefore, adding a new subparagraph (4) to Section 1.1111(b) to provide that fees are not required from local governmental licensees in connection with their operation of a non-commercial broadcast station.

44. *Consultant and Noncompetition Agreement—Assignments and Transfers of Control.* In establishing fees based upon the consideration paid in assignment and transfer transactions, the Commission recognized that such transactions ofttimes involve consultant and noncompetition agreements and that it was necessary to take such agreements into account in determining the consideration paid for such assignment or transfer. Thus in Paragraph 22 of our Report and Order issued on July 1, 1970, we stated that with respect to amounts paid for such agreements that are part of the overall price, the Commission would follow the general principle of tax law which permits a reasonable allocation of the total price to such agreements. Our experience with this approach discloses considerable difficulties in its application in view of the varying complexities in such agreements. On reconsideration therefore, we believe that the amount to be paid for such agreements should be viewed as part of the total consideration given for the station. Although it can be argued that the consideration for a station is separate and apart from that given for consultant services or noncompetition, the agreement for consultant services or noncompetition may also be viewed as part of the overall package which is being purchased, namely, a station without competition from a specified party or station with certain "consultant" services attached to it. (We note too that many consultant and noncompetition agreements simply reflect an approach designed in the light of tax requirements as a consequence of the overall transaction and from that point of view are quite properly to be treated, even under a principle of allocation, as part of the consideration and subject to the grant fee.) On balance, we believe that the latter view is the better one, and it accords with long-standing Commission practice of treating amounts allocated to such agreements as part of the overall consideration for a station. Additionally it avoids the difficult problem of determining whether the amount allocated to such an agreement is a reasonable one, and hence has the virtue of comporting with one of our major concerns in computing fees—that the fee be readily and simply ascertainable. Therefore, our determination of the appropriate fee required to be paid in assignment and transfer matters shall include as part of the "consideration paid," the amounts allocated to such agreements whether such an agreement is part of an overall contract for the sale or transfer of a broadcast station or a separate agreement executed in connection with such sale contract.

45. Numerous questions of a minor nature have been raised during the past six months concerning the language of Sections 1.1102, 1.1103, 1.1116 and 1.1120 of our Rules relating to fees. Clarifying language has, therefore, been inserted in these Sections, and subsections have been renumbered in Section 1.1102. One such insertion warrants specific mention. In Section 1.1102 of our rules dealing with the payment of fees, we attempted to establish a system of payment which was most practicable to those responsible for the payment of fees and which, at the same time, would not operate to delay or hold up our substantive actions in processing applications and issuing grants, approvals and

authorizations. Thus, subparagraph (d)(1) provided that required grant fees are payable within 45 days after grant by the Commission or, in the case of assignments or transfers of control in the broadcast services, immediately following consummation of the transfer or assignment. Unfortunately, however, this accommodation has been abused by some recipients of Commission authorizations in the past six months who have failed or refused to pay the required fee even after specific notification by the Commission. We are, therefore, pointing up, by the insertion of additional language in this sub-paragraph, now numbered Section 1.1102(d), that all grants, approvals and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period, and that failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date. A Joint Petition on behalf of miscellaneous common carriers proposes that the grant fee be payable not within 45 days after the Commission has issued its initial primary authorization, the construction permit, but subsequently upon the filing of the covering license application. However, we are not persuaded that the present requirement places any unreasonable burden upon the recipient of the grant. Further, such an approach would place grant fee payments in a time frame selected by each grantee and this would impose a considerable administrative burden on the Commission.

46. In a Memorandum Opinion and Order issued August 5, 1970 (24 FCC 2d 614), denying various Petitions for Stay of the fee schedules adopted on July 1, 1970, the Commission stated it would maintain adequate records of fee collections so that it could make such refunds as might be appropriate as a result of any changes in the fee schedule which might be adopted by the Commission after determination of the various petitions of reconsideration which had been filed with respect to the new fee schedule. As a result of revisions in the fee schedules adopted herein, certain refunds are in order and appropriate action to accomplish them will be taken by the Commission on its own initiative. The completion of this task may take some time, and the filing of individual requests for refund at this time will only serve to delay the date of completion. It is, therefore, requested that parties await action by the Commission in this regard. If, however, any person claiming entitlement to a refund has not received such refund within 60 days after the issuance of this order, he should then advise the Commission of his claim.

47. As the foregoing paragraphs make clear, major portions of the fee schedule previously adopted by the Commission and made effective as of August 1, 1970, remain unchanged. In the interests of clarity and for ready reference, we are reprinting the entire fee schedule including the changes adopted herein.

48. In view of the foregoing, IT IS ORDERED, That the Petitions noted above are either GRANTED, or DENIED, or GRANTED IN PART or DENIED IN PART, as indicated in the determinations set forth above.

49. IT IS FURTHER ORDERED, pursuant to authority contained in Section 4(i) of the Communications Act of 1934 as amended

(47 U.S.C. Section 154(i)) Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. Section 483(a)), and Budget Bureau Circular A-25 and supplements thereto, that the Schedule of Fees adopted in the Report and Order of July 1, 1970 (FCC 70-694, 35 F.R. 10988) and codified as Subpart G, Part 1, Chapter I, Title 47 of the Code of Federal Regulations, is revised to read as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

SUBPART G—SCHEDULE OF FEES FILED WITH THE COMMISSION

Authority: §§ 1.1101–1.1120 issued under sec. 501, 65 Stat. 290; 31 U.S.C. 483a

GENERAL INFORMATION

§§ 1.1101 Authority.

Authority for this subpart is contained in Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) which provides that any service rendered by a Federal agency to or or for any person shall be performed on a self-sustaining basis to the fullest extent possible. Title V further provides that the head of each Federal agency is authorized by regulation to prescribe such fees as he shall determine to be fair and equitable.

§§ 1.1102 Payment of fees.

(a) *Filing fees.* Each application, including either a petition or notification submitted under the CATV Rules, filed on or after August 1, 1970, for which a fee is prescribed in this subpart, must be accompanied by a remittance in the full amount of the filing fee. In no case will an application or other filing be accepted for filing or processed prior to payment of the full amount specified. Filings for which no remittance is received, or for which an insufficient amount is received, shall be returned to the applicant without processing. In the case of multiple applications for which a single check is drawn to over all fees for the applications, there should be attached to the remittance an accounting sheet or notice stating what fees are covered by the check or money order.

(b) *Grant fees.* The applicant shall observe the instructions contained in the Notice of Grant concerning payment of grant fees. Grant fees shall be accompanied by a transmittal advice identifying the purpose of the check. The duplicate copy of the Commission's Notice of Grant, which will specify the amount of the fee, will suffice.

(c) *All remittances should be accompanied by a letter application, rate card, grant fee notice or other document to properly identify the purpose of the fee.*

(d) Where a grant fee is prescribed in the various services, the fee will be payable within 45 days after grant by the Commission. In the Broadcast services, the grant fee, based on a percentage of the consideration, in assignment and transfer cases must be *transmitted* by the new licensee immediately following consummation of the transfer or assignment. All grants, approvals and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period. Failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date.

(e) *Annual Broadcast fees.* The annual fee prescribed for broadcast stations must be submitted each year on or before the anniversary date of the expiration date of the station's license. The licensee shall file the station's rate card as of the preceding June 1 together with the amount of the annual fee. A new station first becomes liable for the annual operating fee at the time program test authority is granted. In the first year, the fee will cover the period from the date of program test authority until the next payment date. (Example, if a station is in operation for seven full months prior to the next payment date, the fee is 7/12 of the annual rate).

(1) If a station has filed an application for renewal of a station license that will expire after July 31, 1970, any filing fee paid with the renewal application will be credited against the initial annual operating fee. Should a licensee pay the former renewal fee which is no longer required, there will be no refund of the filing fee; it will however be credited against the next annual fee for the station. Licensees should note that they are claiming this credit at the time they submit their rate card and pay their first annual operating fee.

(f) *Annual CATV fees.* The annual fee prescribed for CATV systems must be submitted by April 1 for the preceding calendar year. A new CATV system becomes liable for the annual operating fee as of the date it begins to charge for service to 50 subscribers or more. In the first year of operation of the system, the fee will be computed based on the average of the number of subscribers being served on the last day of each quarter of operation up to the end of the calendar year. (Example, if a system is in operation on the last day of three quarters prior to the end of the calendar year, the average of those three last-day figures it to be used in computing the fee required). The fee will cover the number of full months of operation until the end of the calendar year. (Example, if a system is in operation for seven full months prior to the end of the calendar year, the fee is $\frac{7}{12}$ of the annual rate.) In the first year of this fee schedule, a CATV system's annual fee shall be computed by taking the amount otherwise due and multiplying it by five-twelfths.

(g) Applications and attached filing fees should be addressed to: Federal Communications Commission, Washington, D.C., 20554, or to the appropriate FCC Field Office and should not be marked for the attention of any individual, bureau or office. Fee payments should be in the form of a check or money order payable to the Federal Communications Commission. The Commission will not be responsible for cash sent through the mails. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483a).

(h) Receipts will be furnished upon request in the case of payments made in person, but no receipts will be issued for payments sent through the mails.

(i) Except as provided in §§ 1.1108 and 1.1104, all application filing fees will be charged irrespective of the Commission's disposition of the application. Applications returned to applicants for additional information or corrections will not require an additional fee when resubmitted, unless the additional information results in a major change in the application; the resubmission will then be treated as a new application requiring a new filing fee.

§ 1.1103 Return or refund of fees.

(a) The full amount of any fee submitted will be returned or refunded, as appropriate, in the following instances:

(1) Where no fee is required for the application filed.

(2) Where the application is filed by an applicant who cannot fulfill a prescribed age requirement.

(3) Upon return of an application for renewal of an operator license which is received after expiration of the grace period.

(4) Where the applicant is precluded from obtaining a license by the provisions of section 303(1) or 310(a) of the Communications Act.

(5) Where circumstances beyond the control of the applicant, arising after the application is filed, would render a grant useless.

(6) When applications (accompanied by fees) are filed where not actually required by Safety and Special Radio Services rules (e.g., change of address, pro forma change or corporate name, etc.).

(7) When construction permit holders and licensees make nonsubstantive corrections in license grants within a period of 60 days from grant.

(b) Payments in excess of an applicable fee will be refunded only if the overpayment exceeds $2.00.

§ 1.1104 General exceptions.

(a) No fee is required for an application filed for the sole purpose of amending an authorization or pending application (if a fee is otherwise required) so as to comply with new or additional requirements of the Commission's rules or the rules of another Federal government agency affecting the authorization or pending application; however, if the applicant also requests an additional modification or the renewal of his authorization, the appropriate modification or re-

newal fee must accompany the application. Fee exemptions arising out of this general exception will be announced to the public in the orders amending the rules or in other appropriate Commission notices.

(b) No fee is required for an application filed by an alien pursuant to a reciprocal radio licensing agreement.

(c) A receiver model certificated prior to August 1, 1970, and which will continue to be distributed after August 1, 1970, need not be recertificated and no filing or grant fee shall be required for continued distribution provided it will continue to be distributed under the same trade name and model number and with identical circuitry.

§ 1.1105 General Rule (STA and Waiver).

Except as otherwise provided no filing fee is required for any application or request for special temporary authority (STA) or waiver of brief duration or minor character in any service or for the grant of either an STA or a waiver of brief duration or minor character. Upon the grant of an application or request for either an STA or a waiver of an important character, the applicant will be notified to remit a fee in the following amount for the respective services:

Broadcast Services	$25.00
Common Carrier Services	25.00
Safety and Special Radio	5.00
Cable Television Services	25.00

§ 1.1111 Schedule of fees for Radio Broadcast Services.

(a) Except as provided in paragraph (b) of this section, the fees prescribed below are applicable to applications and operations in the Radio Broadcast Services:

CONSTRUCTION PERMITS

Application for construction permit for new station or for major changes in existing station:

	Filing fee	Grant fee
VHF—Top 50 markets [1]	$3,000	$45,000
UHF—Top 50 markets	2,500	22,500
VHF—Next 50 markets	2,000	18,000
UHF—Next 50 markets	1,000	9,000
VHF—Balance	1,000	9,000
UHF—Balance	500	4,500
FM—Class A	100	900
FM—Class B and C	300	1,800
AM—Day—50 kw	500	4,500
AM—Day—25 kw	400	3,600
AM—Day—10 kw	300	2,700
AM—Day—5 kw	200	1,800
AM—Day—1 kw	100	900
AM—Day—500 w	50	450
AM—Day—250 w [2]	25	225
AM—Unlimited 50 kw	1,000	9,000
AM—Unlimited 25 kw	800	7,200
AM—Unlimited 10 kw	600	5,400
AM—Unlimited 5 kw	400	3,600
AM—Unlimited 1 kw	200	1,800
AM—Unlimited 500 w	100	900
AM—Unlimited 250 w [2]	50	450
AM—Class IV	100	900
For Directional Antenna in addition to the above	50	450

[1] The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

[2] The fee for major changes in 100 watt operations is the same as for 250 watt operations.

Fees, Schedule of

OTHER APPLICATIONS

The following fees shall accompany each application:

	AM	FM	TV	Auxiliary[1]
Applications filed on FCC Form 316 (where more than one broadcast station license is involved, the application must be accompanied by the total amount of the fee prescribed for each license so involved).	$250	$250	$250	No fee
Application for construction permit to replace expired permit, FCC Form 321.[2]	500	500	500	$50
Application for modification other than a major change	50	50	50	50
Application for change of call sign for broadcast station	100	100	100	No fee
All other applications in the broadcast services	50	50	50	50

[1] With respect to applications for remote pickup broadcast stations authorized under Subpart D of Part 74 of this chapter, one fee will cover the base station (if any) and all the remote pickup mobile stations of a main station, provided the applications therefor are filed at the same time.

[2] The $500 fee applies to construction permits for new stations or major changes in existing stations. An application to replace a construction permit for a modification other than a major change must be accompanied by a fee of $50 in all services.

SUBSCRIPTION TELEVISION

Application for Subscription Television Authorizations:
Application Filing Fee..... $1,000

ASSIGNMENTS AND TRANSFERS

Application for assignment of license or transfer of control, exclusive of FCC Form 316 applications (where more than one broadcast station license is involved, the total amount of fees prescribed for each license so involved will be paid in the manner set forth below):

Application Filing Fee..... $1,000.
Assignment and Transfer fee to be paid immediately following consummation of the assignment or transfer. 2 percent of consideration for assignment or transfer.

ANNUAL LICENSE FEES

Each broadcast station shall pay an annual license fee to the Commission that is based on the station's rate card as of June 1 of each year.[1]

For AM and FM radio stations:

The annual fee will be a payment equal to 24 times the station's highest single "one-minute" spot announcement rate, but in no event shall the annual payment for each AM and each FM station be less than $32;

For television broadcast stations:

The annual fee will be a payment equal to 12 times the station's highest "30-second" spot announcement rate, but in no event shall the annual payment be less than $144.

(b) Fees are not required in the following instances:

(1) Applications filed by tax exempt organizations for the operation of stations providing noncommercial educational broadcast services, whether or not such stations operate on frequencies allocated for noncommercial educational use.

(2) Applications in the AM service requesting only authority to determine antenna power by direct measurement.

(3) All television translator applications and all television translator relay stations.

(4) Applications by local government entities in connection with the licensing or operation of a non-commercial broadcast station.

[1] In the first year of this fee schedule, a station's fee will be computed by taking the number of months from the effective date to the payment date divided by 12 times the full year annual fee. Stations beginning operation, pursuant to program test authority, after the license expiration anniversary date are liable for a pro rata amount of the annual fee equal to the number of full months in operation from the date of program test authority to the payment date for the short period.

§ 1.1113 Schedule of fees for Common Carrier Services.

Applications filed for Common Carrier Services shall be accompanied by the fees prescribed below:

	Filing Fee	Grant Fee
DOMESTIC PUBLIC LAND MOBILE RADIO SERVICE [1]		
Application for initial construction permit or for relocation of a base station, including authority for mobile units, blanket dispatch station authority,[2] and standby transmitters without independent radiating systems.[3] [4]	$100	$150.
Application for initial construction permit or for relocation of a dispatch station,[3] auxiliary test station, control station or repeater station.[4]	50	$75.
Application for other than initial construction permit, modification of construction permit or license for base station, dispatch station, auxiliary test station, control station or repeater station at an existing station location.	25	$50.
Application for renewal of base station	25	$125.
Application for renewal of license for dispatch station, auxiliary test station, control station or repeater station.	10	$50.
Application for license, modification of license or renewal of license for individual mobile stations:		
One mobile unit per application	50	None.
Each additional mobile unit per application	30	None.
RURAL RADIO SERVICE		
Application for an initial construction permit or for relocation of central office, inter-office or relay facilities.[4]	100	$100.
Application for other than initial construction permit, modification of construction permit or license for central office, inter-office or relay facilities	25	$50.
Application for license or modification of license for individual subscriber stations.	5	$20.
Application for license for operation of rural subscriber stations at temporary-fixed locations.	10	$20.
Application for renewal of license of central office, inter-office or relay station.	125	None.
Application for renewal of license of rural subscriber station	25	None.
POINT-TO-POINT MICROWAVE RADIO SERVICE		
Applications for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to existing points of communication or for relocation of facilities.[4] [6]	50	$150.
Application for license for operation of a station at temporary-fixed locations.	50	$100.
Application for other modification of construction permit or modification of license.	25	$25.
Application for renewal of license	25	$100.
LOCAL TELEVISION TRANSMISSION SERVICE		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to an existing station location or for relocation of facilities.[4]	50	$150.
Application for license for operation of an STL station at temporary-fixed locations.	50	$100.
Application for license for operation of a mobile television pickup station.	50	$100.
Application for other modification of construction permit or modification of license.	25	$75.
Application for renewal of license	25	$50.
INTERNATIONAL FIXED PUBLIC RADIOCOMMUNICATION SERVICES		
International Fixed Public Station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[4]	150	$600.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter(s) being replaced if both applications are filed simultaneously).	75	$100.
Application for change of location of an authorized station	150	$400.
Application for modification of license	25	$100.
Application for renewal of license	100	$200.

See footnotes at end of table.

	Filing Fee	Grant Fee
International Control Station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[6]	100	$400.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter being replaced if both applications are filed simultaneously).	80	$200.
Application for change of location of an authorized station	100	$400.
Application for modification of license	25	$100.
Application for renewal of license	80	$160.
OTHER RADIO APPLICATIONS		
Application for assignment of an authorization or transfer of control (a separate fee is required for each call sign covered by the application).	10	$80.
All other common carrier radio applications	25	None.
SATELLITE COMMUNICATIONS SERVICES[7]		
Application for initial construction permit for commercial transmit/receive earth station.[4]	200	½ of 1% of construction cost as set forth in the application, not to exceed $50,000.
Application for initial construction permit for a commercial receive only or transportable earth station.[5]	100	½ of 1% of construction cost as set forth in the application, not to exceed $25,000.
Application for initial construction permit for an earth station to be used solely for developmental or noncommercial purposes.[4]	80	$150.
Application for renewal of license for a developmental or noncommercial earth station.	80	$160.
Application for modification of construction permit or license or for construction permit for additional equipment at an existing commercial earth station.	100	½ of 1% of construction cost as set forth in the application.
Application for authority to operate a transportable earth station at a fixed site.	100	$265.
Application for renewal of license for a commercial transmit/receive earth station.	100	$6,600.
Application for renewal of license for a commercial receive only earth station.	80	$660.
Application for initial construction permit or modification of construction permit or license for an auxiliary station (beamsight) to an earth station or for a telemetry, tracking, and control station.	80	½ of 1% of construction cost as set forth in the application.
Application for renewal of license of an auxiliary station to an earth station or for a telemetry, tracking, and control station.	80	$200.
Application for initial construction permit per satellite	200	$5,000.
Application for authority to launch and operate satellites, per satellite.	200	½ of 1% of satellite construction cost as set forth in the application (due 45 days after successful launch and operation).
Application for assignment of a commercial transmit/receive earth station or satellite construction permit or license or transfer of control of a licensee or permittee, per earth station or satellite.	100	$200.
Application for assignment of a commercial receive only or transportable earth station construction permit or license or transfer of control of a licensee or permittee, per earth station.	25	$80.
Application for communications common carrier for authorization to own stock in the Communications Satellite Corporation.	25	$80.
Any other application filed under the Communications Satellite Act or the Communications Act of 1934 in the Satellite Communications Services.	25	$80.
COMMON CARRIER NONRADIO APPLICATIONS		
Section 214 applications for construction landline coaxial cable[9]	100	$5 per route mile.
Section 214 applications to extend or supplement facilities by construction of landline voice cables or installation of carrier equipment on landline wire, cable or radio routes.[9]	80	$5 per 100 equivalent 4 kHz channel miles authorized.[10]
Section 214 applications to lease facilities from other carriers (except overseas channels).[9]	25	$4 per 100 equivalent 4 kHz channel miles authorized.[10]
Section 214 application for overseas cable construction	1,000	$20 per route mile (nautical).
Section 214 applications to establish communication channels on overseas cables.[10]	80	$10 per 100 equivalent 3 kHz miles authorized.[10]
Cable landing license	100	$100.
Section 214 application to acquire overseas cable channels	80	$8 per 100 equivalent 3 kHz channel miles authorized[10]

See footnotes at end of table.

	Filing Fee	Grant Fee
Section 214 application to acquire domestic circuits to interconnect international circuits:		
Circuits outside of the United States	25	None.
Circuits within the U.S. or Territories	25	25 per 100 equivalent 4 kHz channel miles authorized.[1] [2]
Section 214 applications to install carrier equipment to establish channels of communication at an earth station.	100	½ of 1% of equipment and installation cost as set forth in the application.
Section 214 application to establish and provide channels of communication via satellite.	50	$250.
Section 214 application to acquire satellite channels	50	$20 per equivalent 4 kHz channel.
Section 214 applications to discontinue, reduce or impair service to the public:		
Telephone companies	50	$50.
Telegraph companies	10	$15.
Public Coast Stations	10	$15.
Interlocking Directorate applications	10	$40.
Section 221 applications	10	$200.
Tariff applications to change charge or regulations on less than statutory notice	25	None.
All other Common Carrier nonradio applications	25	None.

[1] In this service each transmitter at a fixed location is a separate station notwithstanding the inclusion of more than one such station on a single authorization or under a single call sign.

[2] When included as part of a base station application, a request for blanket dispatch station authority made pursuant to the provisions of § 21.519(a) of this chapter does not require an individual application. A request for such dispatch station authority filed separately from a base station construction permit application requires an application for modification of license and an appropriate fee.

[3] An application for a standby transmitter having its own independent radiating system requires the same fee as a base station application.

[4] No additional fee will be charged for applications for licenses to cover a construction permit unless there is a modification or variation of outstanding authority involved. In that event the appropriate fee for modification is applicable.

[5] This fee applies to any request for dispatch station authority not made pursuant to § 21.519(a) of this chapter.

[6] For applicants who propose to multiplex their radio systems and who make the supplementary showing required by § 21.706 of the Rules in the lead application in lieu of filing a separate application under Section 214 of the Act, an additional grant fee will be payable at the rate of $6 per 100 equivalent 4 kHz channel miles, as prescribed in the schedule for Section 214 applications to extend or supplement facilities.

[7] The filing fees specified in the schedule for satellite communications services do not apply to initial applications for domestic systems to be considered in conjunction with that of Western Union; Public Notice FCC 70-963. However, the grant fees will be applicable to any grant. All subsequent applications will be subject to the filing as well as the grant fees.

[8] In the case of connecting circuits for international satellite circuits the mileage is computed as the distance from the United States terminal to the nearest earth station.

[9] Projects undertaken pursuant to grant of continuing authority as prescribed in §§ 63.03(c) and 63.04(c) of the Commission's Rules are subject to the grant fee.

[10] Fees for other than 4 kHz channels or 3 kHz channels will be the appropriate multiples or fractions of the 4 kHz or 3 kHz channel fee.

§ 1.1115 Schedule of fees for the Safety and Special Radio Services

(a) Except as provided in paragraph (c) of this section, the fees set forth in the schedule below shall accompany all formal applications for authorizations filed in the Safety and Special Radio Services:

Applications for all authorizations except as noted below	$20
Interim ship license including subsequent initial license	25
Operational fixed stations using frequencies above 952 MHz:	
Initial license and 5 year renewal	75
Assignment of license	75
Yearly renewal	15
Common Carrier Public Coast Stations:	
Initial license and renewal	75
Assignment of license	75
Amateur Service:	
Initial license, renewal and new class of operator license	9
Modification of license without renewal	4
Modification of license with renewal	9
Special Call Sign (plus other applicable fee)	25

(b) Except as provided in paragraph (c) of this section, the fees set forth below shall accompany the following applications or requests filed in the Safety and special Radio Services:

Duplicate license	6

(c) Fees are not required in the following instances:

(1) Applications filed in the Police, Fire, Forestry-Conservation, Highway Maintenance, Local Government, and State Guard Radio Services.

(2) Applications filed by governmental entities in any of the Safety and Special Radio Services.

(3) Applications filed by the following in the Special Emergency Radio Service: Hospitals, Disaster Relief Organizations, Beach Patrols, School Buses, and non-profit Ambulance Operators and Rescue Organizations.

(4) Applications filed in the Disaster Communications Services.

(5) Applications for ship inspections pursuant to the Great Lakes Agreement, the Safety of Life at Sea Convention, and Parts II and III, Title III, of the Communications Act of 1934, as amended.

(6) Applications for Novice Class license in the Amateur Radio Service, applications for amateur stations under military auspices, and applications filed in the Radio Amateur Civil Emergency Services (RACES).

(7) Operational fixed Microwave Applications filed for Closed Circuit Educational Television Service.

(8) Applications for Civil Air Patrol Stations, Aeronautical Radionavigation Stations and for Aeronautical Search and Rescue Stations.

§ 1.1116 Schedule of fees for Cable Television Services.

(a) Applications, notifications and petitions filed in the Cable Television Services shall be accompanied by the fees prescribed below:

Applications in the Community Antenna Relay Service (CARS)

For a construction permit	$50
For a license or renewal	15
For a modification of construction permit or license	15

Petitions

For special relief (other than that specified below), pursuant to § 74.1109	25
For experimental operations pursuant to paragraph 51 of the December 1968 *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397* (see also, proposed § 74.1107 (b) and (c) in Appendix C of that *Notice*)	25
For waiver of hearing re carriage of distant signals within the Grade A contour of a television broadcast station in a top-100 market:	
Per proposed commercial (a) VHF station or (b) network-affiliated UHF station, distant signal	25
Per proposed (a) educational station or (b) independent UHF station, distant signal	10

Note: For purposes of the station fees only, if the communities involved in a single petition are served by CATV facilities having a common head end and identical ownership, only a single set of station fees is required for all of the communities.

Notifications pursuant to § 74.1105	10

Note: A fee is required for each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by a CATV system, even if there is a single head end and identical ownership of facilities extending into several communities. See, e.g., Telerama, Inc., 3 FCC 2d 585; Mission Cable TV, Inc., 4 FCC 2d 236.

(b) An annual fee shall be paid by each CATV system on or before April 1 of each year for the preceding calendar year. The fee for each system shall be equal to the number of its subscribers times 30 cents. The number of subscribers shall be determined by averaging the number of subscribers on the last day of each calendar quarter. (See § 1.1102(c)).

Note: Where a system offers bulk-rates to multiple-outlet subscribers, such as apartment house or motel operators, each bulk-rate contract is viewed as a number of subscriptions to be calculated by dividing the total annual charge for the bulk-rate contract by the system's basic annual subscription rate for an individual household. (Thus, for example, if a CATV system charges an apartment house operator $1000 a year for a bulk-rate contract and charges individual households a basic rate of $50 per year, the bulk-rate contract is counted as 20 subscriptions (i.e. 1000÷50=20). Where a variety of "annual subscription rates" for individual households exists (e.g., $50 per year, if paid in one sum, or $60 per year, if paid on a per-month basis), the rate used in the subscriber formula should be the lowest annual rate which is offered to individual subscribers ($50 here). Likewise, if the bulk-rate contract is on a monthly basis, it should be divided by the lowest monthly rate which is offered. In the preceding example, a $50 per year charge should be viewed as a charge of $4.17 per month. It is not contemplated, however, that such calculations should be made with respect to extra payments for additional CATV outlets within the same individual household.

(c) Fees are not required in the following instances:

(1) Petition for special relief filed pursuant to Section 74.1109 by a noncommercial educational broadcast station.

§ 1.1117 Schedule of fees for commercial radio operator examinations and licensing.

(a) Except as provided in paragraph (b) of this section, applications filed for commercial radio operator examinations and licensing shall be accompanied by the fees prescribed below:

Applications for operator license

First-class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$5
Second-class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	4
Third-class permit, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	3
Provisional radiotelephone third-class operator certificate with broadcast endorsement—1 year term	2
Restricted radiotelephone permit, new, duplicate, or replacement	2
Restricted radiotelephone permit (alien)—1 year term	2
Application for endorsement of license	2
Application for verification card (FCC Form 758–F)	2
Application for posting statement (FCC Form 759)	2

(b) Whenever an application requests both an operator license and an endorsement, the required fee will be the fee prescribed for the license document involved.

§ 1.1119 Experimental Radio Services (other than Broadcast).

Fees are not required in the case of applications filed in the Experimental Radio Services (other than Broadcast).

§ 1.1120 Schedule of fees for equipment type approval, type acceptance and certification.

Type approval, type acceptance, certification or approval of subscription television systems shall require payment of fees as prescribed below.

Certification

Item	Filing fee	Grant fee
1. Application for certification of each receiver Model:		
(a) Television broadcast receiver	$10	$40
(b) FM broadcast receiver	10	20
(c) Any other receiver	5	20
2. Application for prototype certification of equipment operating under Part 18		
3. Request for modification of certificated receiver with no change in model number:[1]		
(a) Television broadcast receiver	10	20
(b) FM broadcast receiver	5	20
(c) Any other receiver	5	20

See footnotes at end of table.

Certification

Item	Filing fee	Grant fee
4. Request for modification of a prototype certificated equipment operating under Part 15 with no change in model number.[1]	5	15
5. Application for certification of a radio control transmitter for a door opener under Part 15.	5	20
TYPE ACCEPTANCE		
1. Application for type acceptance of each equipment type [2][3][4][5]	25	75
2. Application for the addition of one or more rule parts to existing type acceptance for each equipment type as identified by manufacturer (or trade name) and type number.	25	75
3. Approval of subscription television system	200	800
TYPE APPROVAL[6][7]		
1. Application or submission for type approval: [8]		
(a) Part 73:		
(1) Broadcast modulation monitors—SCA & stereo	100	400
(2) Broadcast modulation monitors—other	50	200
(3) Other broadcasting equipment	50	200
(b) Parts 81 and 83:		
(1) Ship transmitters including lifeboat transmitters	25	125
(2) Radar	25	75
(3) Ship automatic alarm systems	25	75
(4) Ship alarm automatic keyers	50	250
(5) Other maritime devices	25	75
(c) Part 15:		
(1) Wireless microphones	50	150
(2) Other low-power devices	25	125
(d) Part 18:		
(1) Medical diathermy	25	75
(2) Epilators	100	400
(3) Microwave ovens	100	400
(4) Medical ultrasonic	200	800
(5) Industrial ultrasonic	50	200
(6) Other ISM devices	50	200
2. Applications for modification of existing type approved equipment: [9]	50	200
(a) Modifications which require testing:		
(1) Parts 73 and 15	50	200
(2) Parts 15, 81, and 83	25	75
(b) All other modifications	10	40

[1] A request for modification of certificated equipment which involves a change in type (or model) number will be considered as an application for a new certification under items 3 and 4 of the schedule.

[2] The receiver part of a transceiver or a unit which includes a transmitter and receiver shall be separately certificated. The application for receiver certification shall be filed simultaneously with, but under separate cover from, the application for type acceptance.

[3] In the case of an equipment in which one or more receivers and transmitters are packaged as an individual equipment and identified by a single type number, each receiver shall be separately certificated. The application(s) for certification for each receiver shall be filed simultaneously with, but under separate cover from, the application for type acceptance.

[4] Application(s) for type acceptance of equipments which bear different identification will be considered separate applications, regardless of whether such equipment may be otherwise identical.

[5] Fees for type acceptance are not required in the following cases:

(a) When a request for type acceptance is included in an application for station license and covers only the item of equipment to be authorized in that particular station;

(b) When a request is made by the licensee of a station for approval of modifications to a specific item of existing type accepted equipment authorized in that particular station.

[6] Whenever an item subject to type approval is required to comply with more than one set of technical specifications, separate fees will be required for each set of technical specifications for which compliance is examined. For example, a combined frequency and modulation monitor will require the payment of fees applicable to each; a frequency monitor for standard broadcast and FM broadcast will require payment of fees applicable to each. Likewise, combination units of items of the same type, for example, a combination of two radars, will require the payment of two fees.

[7] Application(s) for type approval of equipment which bear different identification will be considered separate applications, regardless of whether such equipment may be otherwise identical.

[8] A request for modification of a type approved equipment which involves a change in type (or model) number will be considered as an application for a new type approval under item 1 of the schedule.

[9] Initial applications for type approval which request use of alternate magnetrons or other critical components will require payment of the fee indicated in 1 plus the fee required in 2(a).

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

September 23, 1959 — CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not apply to activities of the legislative and judicial branches, the municipal government of the District of

Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

b. *Lease or sale.* Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

4. *Agency responsibility.* The responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies in this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices.

5. *Cost, fees and receipts, and their determination.*

a. *Determination of costs.* Costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be

established solely for this purpose. The cost computation shall cover the direct and indirect costs to the Government of carrying out the activity, including but not limited to:

(1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation and depreciation of buildings and equipment, and personnel costs other than direct salaries (e.g., retirement and employee insurance);

(2) A proportionate share of the agency's management and supervisory costs;

(3) A proportionate share of military pay and allowances, where applicable;

(4) The costs of enforcement, research, establishing standards, and regulation, to the extent they are determined by the agency head to be properly chargeable to the activity.

b. *Establishment of fees to recover costs.* Each agency shall establish fees in accordance with the policies and procedures herein set forth. The provisions of this Circular, however, are not to be construed in such a way as to reduce or eliminate fees and charges in effect on the date of its issuance. The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. The cost of providing the service shall be reviewed every year and the fees adjusted as necessary. In establishing new fees and increasing existing fees the agency may make exceptions to the general policy (paragraph 3, above) under such conditions as illustrated below.

(1) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

(2) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization; or comparable fees are set on a reciprocal basis with a foreign country.

(3) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(4) Payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program.

c. *Disposition of receipts.* Legislative proposals shall generally avoid disturbing the present rule that collections go into the general fund of the Treasury as miscellaneous receipts. However, exceptions may be made where:

(1) It is intended that an agency or program or a specifically identifiable part of a program be operated on a substantially self-sustaining basis from receipts for services performed or from the sale of products or use of Government-owned resources or property.

(2) The agency can show that the initiation or increase of fees or charges is not feasible without earmarking of receipts.

(3) The receipts are in payment of the cost of authorized special benefits for which the demand is irregular or unpredictable, such as inspections performed upon request outside the regular duty hours.

This Circular is not intended to change the present system of sharing with States and counties receipts from the lease of certain lands and the sale of certain resources.

6. *Changes in existing law.* In cases where collection of fees and charges for services or property in accordance with this Circular is limited or restricted by provisions of existing law, the agencies concerned will submit appropriate remedial legislative proposals to the Bureau of the Budget under the established clearance procedure, as provided in Bureau of the Budget Circular No. A-19.

7. *New activities.* In the establishment of new Federal activities which would provide special benefits, the agencies concerned are to apply the policies and criteria set forth in this Circular.

8. *Reports to the Bureau of the Budget.* Each agency shall make a report by December 31, 1959, for each bureau or comparable organizational unit, of the costs and charges for all services or property covered by this Circular, and shall also make a report of changes not later than December 31 of each succeeding year as a result of its annual review of such costs and charges. The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted on December 31 following the end of the first fiscal year during which the agency was in operation. Each report shall cover the situation as of the preceding June 30, and shall be prepared in accordance with the instructions set forth in the attachments to this Circular.

By direction of the President:

MAURICE H. STANS
Director

Attachments

ATTACHMENT A
CIRCULAR No. A-25

INSTRUCTIONS FOR THE PREPARATION OF ANNUAL REPORTS ON USER CHARGES

1. *Form and coverage of reports.* Reports shall be prepared on Standard Form No. 4, as illustrated in Attachment B. An original and two copies will be required.

The initial report should represent a complete inventory of all services of the agency which provide a special benefit to recipients above and beyond those accruing to the public at large, and all activities under which federally owned resources or property are or could be sold or leased.

Subsequent reports covering the annual review of costs and charges shall cover only (a) services and activities not reported earlier; (b) services and activities for which charges have been changed; and (c) services and activities for which changes in the applicable category (as described below) have taken place.

2. *Preparation of Standard Form No. 4.*

a. A separate form will be prepared for each of the following categories, where applicable:

(1) Special services for which existing charges are producing full cost recovery; and lease or sale activities which are returning fair market value.

(2) Special services for which existing charges are producing less than full cost recovery; and lease or sale activities for which less than fair market value is being obtained.

(3) Special services and activities for which no charges are currently being made, and for which charges

are apparently required by the provisions of this Circular.

(4) Special services and activities for which no charges are to be made in accordance with the policy guidelines and exceptions provided in this Circular.

(5) Services and activities which have been discontinued or transferred to other agencies since the previous report. (This category is not applicable to the initial report.)

The category of items covered by each form will be identified in the heading by placing an "X" in the box corresponding with the number of the category as shown above. Forms need not be submitted for categories in which there is nothing to be reported.

b. Columns on the form will be completed as follows:

(1) Enter the identification number for the service or activity. Each service and activity shall be assigned an identification number which shall be retained from year to year, to facilitate identification in future annual reports. Agencies may devise their own coding systems for this purpose.

(2) List each special service provided under a heading "Special services", and each lease or sale activity under a heading "Lease or Sale."

(3) Enter the unit for measuring the service or property provided.

(4) Enter the amount of the charge being made for each unit as of the preceding June 30. In cases where there are various rates for differing situations, a summary schedule of rates may be attached in lieu of listing each rate individually.

(5) Enter the date the charge shown in column 4 became effective.

(6) Enter the amount of the charge which was made previous to the date in column 5.

(7) Enter the number of units of activity for the last completed fiscal year.

(8) Enter (in thousands of dollars) the cost of providing the service or the fair market value of resources or property sold or leased.

(9) Enter (in thousands of dollars) the amount of collections (net of refunds) during the last completed fiscal year.

(10) Enter the symbol of the receipt account, appropriation account, or fund account (excluding deposit funds) to which the collections were or will be credited.

(11) Enter any pertinent explanatory comments relating to the information shown in the preceding columns. On reports covering categories 2, 3, and 4, specifically note in this column, for each item, the reason(s) that full cost recovery or fair market value is not obtained. Also indicate whether full cost recovery for special services or fair market value for lease and sale activities can be obtained under existing law; the status of specific legislative proposals (e.g., under study, drafted, cleared, introduced, or reported); and the status of proposed administrative changes in fees and charges, including effective dates.

On reports subsequent to the initial report, indicate in this column the previous category in which the item was reported. On reports covering category (5), identify the services and activities transferred to other agencies or organizational units and the agency or organizational unit to which the transfer was made.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1439

NEW ENGLAND POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 71-1539

INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 71-1555

TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

D–2

Petitions for Review of Order of the Federal Power Commission

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Decided August 15, 1972

Mr. William J. Madden, Jr., with whom *Mr. Thomas M. Debevoise* was on the brief, for petitioner in No. 71-1439.

Mr. Stanley M. Morley, with whom *Messrs. Francis H. Caskin, Edward A. Caine* and *Jerome J. McGrath* were on the brief, for petitioners in No. 71-1539.

Mr. Melvin Richter, with whom *Mr. Harry S. Welch* was on the brief, for petitioner in No. 71-1555.

Miss Joan E. Heimbigner, Attorney, Federal Power Commission, for respondent. *Messrs. Gordon Gooch*, General Counsel, Federal Power Commission, *Leo E. Forquer*, Solicitor, *J. Richard Tiano*, First Assistant Solicitor, and *William P. Diener*, Assistant Solicitor, Federal Power Commission, were on the brief, for respondent.

Before TAMM, ROBB and WILKEY, *Circuit Judges*.

TAMM, *Circuit Judge*: In this case several representatives of the natural gas pipeline and electric industry petition the court to review and set aside Federal Power Commission Order No. 427 revising existing fee schedules for filing applications under the Natural Gas Act and Federal Power Act and assessing annually the costs of administering these programs against jurisdictional companies in accordance with formulae set forth in the order. Petitioners attack both the Commission's authority to impose the fees in question and the methods employed by the Commission in allocating the fees and charges. Since it is our view that the Commission lacked statutory authority to act, we pretermit consideration of the latter issue and accordingly grant petitioners the relief they seek.

I. *The Order*

On March 18, 1971, the Commission issued Order No. 427, which (a) revised a schedule of filing fees originally promulgated in a 1966 rulemaking proceeding [1] for certain applications by natural gas companies pursuant to the Natural Gas Act; [2] (b) established for the first time a schedule of filing fees for various applications and rate schedule filings made by electric utilities pursuant to Parts II and III of the Federal Power Act; [3] and (c) established, also for the first time, a system whereby the costs of administering Parts II and III of the Federal Power Act and the Natural Gas Act, not met by filing fees, will be annually assessed against jurisdictional companies in accordance with formulae set forth in the order. Petitioners do not complain of the increased filing fees under the Natural Gas Act nor of the new fees under the Federal Power Act, but, rather, the nub of their complaint goes to the annual charges assessed. We therefore must examine them in greater detail.

The Commission imposed two types of annual charges upon pipeline companies. The first type, denominated an "annual general charge," imposed only upon Class A and Class B pipeline companies,[4] is computed as follows: Ini-

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[1] Order No. 317, 35 F.P.C. 30. The 1966 order stated that applications seeking specific authorizations required by the Natural Gas Act must be accompanied by a nominal $50 filing fee. Furthermore, fees were imposed for pipeline applications for certificates of public convenience and necessity based upon the higher of the estimated or actual cost of particular pipeline projects.

[2] 15 U.S.C. § 717 (1970) *et seq.*

[3] 16 U.S.C. § 824 (1970) *et seq.*

[4] Interstate natural gas pipeline companies are classified for accounting and reporting purposes in the Commission's

tially, the Commission determines the cost of administering its pipeline programs, subtracting therefrom the revenues derived from its first flat filing and pipeline certificate fees. The resultant net cost is recorded against a particular Class A or B pipeline based upon the ratio of its total jurisdictional gas deliveries to the total jurisdictional gas deliveries of all Class A and B pipelines. The second annual charge, denominated the "annual reserves added assessment," is imposed upon pipeline companies required to file an Annual Report—Total Gas Supply on FPC Form No. 15. The assessment is one-tenth of a mill for each Mcf of new reserves certificated for a particular calendar year as shown on that particular pipeline's Form No. 15.

The annual charge imposed upon jurisdictional electric utilities is computed as follows: A determination is made for each year of the administration costs of the Commission's public utility regulatory programs (other than those associated with coordination and reliability) from which is deducted the costs associated with services rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act and the amounts received during the same period as filing fees. The "adjusted cost" is then assessed against each public utility in the proportion that the sum of the gross jurisdictional kilowatt hours it sells at wholesale and those it delivers under interchange power agreements bears to the sum of the gross jurisdictional sales by all public utilities. Furthermore, a determination is made of the Commission's cost of administration associated with its coordination and

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Uniform System of Accounts according to the amount of their annual gas operating revenues as follows:

Class A—$2,500,000 or more
Class B—$1,000,000 to $2,500,000
Class C—$150,000 to $1,000,000
Class D—$25,000 to $150,000

reliability programs which is then assessed against each public utility in the proportion that the gross revenues of such company bears to the sum of the gross electric revenues of all public utilities.

The authority upon which the Commission relied in its order assessing the foregoing annual charges and fees was Title V of the Independent Offices Appropriation Act of 1952.[5] In addition, the Commission now asserts before this court for the first time that it also bases its authority to act upon Section 16 of the Natural Gas Act[6] and Section 309 of the Federal Power Act.[7] We now turn to an examination of these statutes, the appropriate legislative history, the relevant administrative interpretations, and comparable statutes.

II. *Title V of the Independent Offices Appropriation Act of 1952*

A. *The Statute*

The Commission primarily bases its authority to impose the annual general charge upon Title V of the Independent Offices Appropriation Act of 1952, which provides in pertinent part:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and

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[5] 65 Stat. 290, 31 U.S.C. § 483a (1970).

[6] 15 U.S.C. § 717o (1970).

[7] 16 U.S.C. § 825h (1970).

> subject to such policies as the President may prescribe) to prescribe therefore such fee, charge, or price, if any, as he shall determine to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . .

The legislative history behind this proviso, a "rider" to the appropriations bill, is sparse, but its purpose was made quite clear by the Report of the House Committee on Appropriations which we now set forth:[8]

> The Committee is concerned that the Government is not receiving full return from many of *the services which it renders to special beneficiaries.* Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.
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> . . . .
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> The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. (Emphasis supplied).

As the foregoing legislative history makes clear, Title V was enacted to allow the agency to recoup costs from identifiable "special beneficiaries" where the services rendered inured to the benefit of special recipients not the general public. The statute has been consistently inter-

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[8] H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2-3 (1952).

preted in this manner by the agencies of the executive branch of Government.[9]

B. *Agency Interpretation of Title V*

1. *Budget Circular No. A-25*

The standards and guidelines for application of Title V have been set forth by the Bureau of the Budget (now Office of Management and Budget) in Budget Circular No. A-25 of September 23, 1959, wherein the Bureau stated that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received

[9] Petitioners rely upon Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965), where the court upheld nominal filing fees upon certain types of radio license applications. However, in that case, unlike the instant one, the court was dealing with specific applications submitted to the Commission which conferred specific benefits upon the applicant.

> by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)."

However, the Circular states no charge should be levied for services rendered "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public."

The Commission urges that the annual charge comes within the terms of Circular No. A-25 because the charge relates to the cost incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and although such regulation "has provided continuing benefits to consumers," it has also

> redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands.

The Commission has, however, missed the point. The creation of an "economic climate" is not a special service nor is a particular pipeline or gas company the "special beneficiary" of such a climate any more than any other pipeline, gas company or the consumer in general. Indeed, under the Commission's order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. In effect then, the contemplated charges would have no relation to specific services or benefits rendered. The Commission must then fall back upon its "economic climate" argument which is obviously an overly broad benefit particularly in light of the requirement that the charges be for a "measurable unit of service." Furthermore, the statutory language—"to or for any person"—as well as the Budget Circular require

an identifiable recipient. The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. This assumption is erroneous in that in any given year some companies may require substantial services from the Commission while others may neither require nor desire them.

In sum, we conclude that the regulation of these industries is primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held.[10] There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.

2. *Federal Power Commission Order 317*

In Order 317, the original fee schedule imposed in 1966,[11] the Commission espoused a position precisely opposite from that which it now espouses, concluding that the charges at issue were general, and therefore without statutory foundation. We wholeheartedly concur in the Commission's earlier observation contained in the Notice of Proposed Rulemaking wherein the Commission stated:

The Commission has reviewed its functions under . . .

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[10] *See* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388-89 (1959); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 610-12 (1944).

[11] *See* note 1, *supra*.

the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under . . . the . . . rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies.[12]

III. *Section 16 of the Natural Gas Act & Section 309 of the Federal Power Act*

The Commission asserts for the first time on appeal that it relies upon Section 16 of the Natural Gas Act [13] and Section 309 of the Federal Power Act [14] as authority for

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[12] 30 Fed. Reg. 12077 (September 15, 1965).

[13] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

15 U.S.C. § 717o (1970).

[14] The Commission shall have power to perform any and

Order 427.[15] Although we view this as *"post hoc* patchwork,"[16] we have considered and rejected the argument. Both sections are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented "consistently with the provisions and purposes of the legislation,"[17] and

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all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, and information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

16 U.S.C. § 825h (1970).

[15] The Commission's order does mention sections 16 and 309, however, not as substantive authority to prescribe fees, but merely as a point of reference to the source of the Commission's power to issue regulations implementing the basic grant of authority to charge the fees cataloged in Title V.

[16] Braniff Airways, Inc. v. Civil Aeronautics Board, 126 U.S.App.D.C. 399, 411, 379 F.2d 453, 465 (1967).

[17] Public Service Commission of New York v. Federal Power Commission, 117 U.S.App.D.C. 195, 198-99, 327 F.2d 893, 896-97 (1964).

"that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the act."[18] These sections merely augment existing powers conferred upon the agency by Congress,[19] they do not confer independent authority to act.

IV. *Comparable Statutes*

Putting aside Title V as authority for the order, it is highly significant that neither the Natural Gas Act nor Parts II or III of the Federal Power Act impose fees upon companies for regulation costs while Section 10(e) of the Federal Power Act explicitly requires licensees thereunder to pay annual charges "fixed by the Commission for the purpose of reimbursing the United States for the costs of administ[ering]" Part I of the Act.[20] The Congress could have, but did not set forth a provision similar to section 10(e) in the statutory sections here under review. Furthermore, many states have adopted statutes which authorize the local regulatory agency to recover from companies subject to their regulation the costs of administration either on a fixed-fee basis for specific services or as a percentage of some measure of size or value.[21] While it is clear that legislatures have the authority to so act, it is equally clear that Congress failed to do so here.

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[18] Niagara Mohawk Power Corp. v. Federal Power Commission, 126 U.S.App.D.C. 376, 381, 379 F.2d 153, 158 (1967) (footnote omitted).

[19] *See also* Mesa Petroleum Corp. v. Federal Power Commission, 441 F.2d 182 (5th Cir. 1971).

[20] 16 U.S.C. § 803(e) (1970). *See also* 16 U.S.C. § 803(f) (1970).

[21] Subcomm. on Intergovernmental Relations of the Senate Comm. on Operations, 90th Cong. 1st Sess., State Utility Commissions 22 (Comm. Print September 11, 1967).

V. *Conclusion*

For the foregoing reasons the order of the Commission under review is set aside with respect to the annual charges levied against petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-20) is reported at 464 F. 2d 1313. The opinions of the Federal Communications Commission (Pet. App. B-1 to B-30 and B-33 to B-59) are reported at 23 F.C.C. 2d 880 and 28 F.C.C. 2d 139.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1972, and petitions for rehearing were denied on October 2, 1972. The petition for a writ of certiorari was filed on January 2, 1973. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1) and 2350.

QUESTION PRESENTED

Whether the Federal Communications Commission acted within its authority under 31 U.S.C. 483a, in imposing annual fees on cable television systems after taking into account "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts" as required by the statute.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act, 1952 (31 U.S.C. 483a) provides:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the Executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine,

in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this Title shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this Title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

National Cable Television Association, Inc. (NCTA), seeks review of a decision of the court of appeals, affirming an order of the Federal Communications Commission under Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, imposing annual fees on cable television systems.

The Commission first established fees to be paid by beneficiaries of Commission regulation in 1963 (*Fees,* 34 F.C.C. 811, affirmed, *Aeronautical Radio* v. *United States,* 335 F.2d 304 (C.A. 7), certiorari denied, 379 U.S. 966), and its fee schedule has been under continuing review since that time. See *Fees,* 1 F.C.C. 2d 1349. Consistent with this continuing review and with congressional directives that fee charges be adjusted upward to make Commission activities more nearly

self-sustaining,[1] the Commission issued a Notice of Proposed Rule Making on February 18, 1970, *Schedule of Fees,* 21 F.C.C. 2d 502 (35 Fed. Reg. 3815). The notice indicated that the Commission was undertaking a comprehensive revision of its fee policy with respect to all communications services subject to its regulation. The notice included new fee proposals for community antenna television (CATV) operations, and for the testing and approval of radio frequency equipment.[2]

In its proposed rules, the Commission sought to reflect more accurately the "value to the recipient" standard set forth in 31 U.S.C. 483a by imposing fees related to the value of an authorization or license. It explained, however, that "value to the recipient" varied when assessed in the context of different communications services (35 Fed. Reg. 3815, 3816–3817):

> Broadcast services are commercial enterprises which exist on an "advertiser-supported" basis,

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[1] See, *e.g.*, H. Rep. No. 91–316, 91st Cong., 1st Sess., p. 8; H. Rep. No. 91–649, 91st Cong., 1st Sess., p. 6.

[2] These areas, the Commission noted, are "the subject of Commission regulation and * * * directly or indirectly receive what in effect is a Commission authorization tantamount to a [license]." 35 Fed. Reg. 3815, 3816. It further observed that cable systems, "as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations." *Id.* at 3816. And, "[w]hile the Commission's regulatory approach does not require a prior approval by the Commission in the form of a 'license' before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations." *Id.* at 3816.

without direct charge to the listening public, while common carrier communication companies provide their services to all users at prices set forth in tariffs. On the other hand, CATV systems operate on a somewhat similar basis as common carriers but their provision of but one kind of service to each subscriber at the same price permits a different approach in considering "value to the recipient" than is possible with communications common carriers which utilize the same facilities for the provision of different services to different customers.

After considering extensive comments by interested parties, the Commission adopted on July 1, 1970, the revised *Schedule of Fees* (Pet. App. B–1). The fee schedule resulted from the Commission's consideration of direct and indirect costs to the government, public policy, and value to the recipient of its services, with the overriding statutory objective that the agency's work be "self-sustaining to the full extent possible."

The Commission found that CATV revenues were approximately $220,000,000 (Pet. App. B–6), and that the Commission expended $1,145,400 annually or 4.6 percent of its total budget on its cable television activities (Pet. App. B–3). To recover these costs, the Commission established for each CATV system an annual fee of 30 cents multiplied by the number of subscribers of the system. This amounted to 0.5 percent or less of a system's revenues (Pet. App. B–19). On petitions for reconsideration, the Commission made certain modifications to its fee schedule but did not alter the basic annual fees imposed on cable television operators (Pet. App. B–33, B–44 to B–45).

On petitions for review, the court of appeals affirmed

the fee schedule in all respects (Pet. App. A–20). The court found that the Commission has jurisdiction over CATV operators and that these operators "have received 'valuable benefits' sufficient to justify the imposition of the annual fee" (Pet. App. A–17). It pointed to "various regulations designed to keep entry into the industry open," "proposed rules limiting the amount of franchise fees which local governments could charge cable operators," and the fact that "regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators" (Pet. App. A–17). Moreover, the court noted that the Commission's extensive broadcast regulation also benefits cable operators (Pet. App. A–18):

> CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear the CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

The court concluded that, in view of the benefits received by CATV systems and the congressional policy in favor of making the Commission's operations as self-sustaining as possible, the Commission's action in imposing the annual fees was not unreason-

able or arbitrary (Pet. App. A–19 to A–20). Petitions for rehearing were denied (Pet. App. A–21).[3]

ARGUMENT

1. The court of appeals correctly ruled that the Commission acted within its authority under 31 U.S.C. 483a in imposing annual fees on the cable television industry.

The Commission has regulatory jurisdiction over cable television systems. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; *United States* v. *Midwest Video Corp.*, 406 U.S. 649. In its earlier regulation, the Commission was concerned that cable operators importing distant signals might impair or destroy free broadcasting operations and thus restricted such distant signal importation. The Commission's traditional activity of protecting the engineering integrity of broadcast signals in the public's electromagnetic spectrum insured that cable operators would in fact have adequate free broadcast signals to carry. As its regulations developed, the Commission promulgated rules designed to keep entry

[3] Since the decision below, the President, in his 1974 budget, proposed substantial increases for FCC cable activities, including 53 new positions at a cost of approximately $710,000. And, in December 1972, the Commission published a *Notice of Proposed Rulemaking, Schedule of Fees*, 37 Fed. Reg. 28574. The notice observed that administrative costs attributable to cable regulation were expected to reach $3,000,000 or 7.3 percent of the Commission's total budget. To recover these additional costs, the Commission proposed to increase its annual CATV fees from 30 to 40 cents per subscriber. 37 Fed. Reg. 28574, 28580.

into the industry open (Pet. App. A–17) and to limit the franchise fees local governments could charge cable operators. See 47 C.F.R. 76.31(b) (36 F.C.C. 2d at 219). Thus, the Commission's regulation of CATV has changed substantially; many of the new rules inure to the benefit of cable operators. See, *e.g., Cable Television Report and Order,* 36 F.C.C. 2d 141.

NCTA contends that the fee schedule imposed by the Commission is invalid on the ground that the Commission did not properly consider the "value to the recipient" factor contained in 31 U.S.C. 483a. This argument—in essence a contention that the Commission acted arbitrarily in formulating the annual CATV fees—was properly rejected by the court below.

As the Seventh Circuit held in *Aeronautical Radio* v. *United States,* 335 F. 2d 304, certiorari denied, 379 U.S. 966, the Commission is obligated in imposing fees under 31 U.S.C. 483a to consider the direct and indirect costs to the government in performing its services for special beneficiaries, the public policy involved, and the value of the services to the recipient. With regard to the value factor, the Seventh Circuit stated (335 F. 2d at 310–311):

> [W]e see no requirement in § 140 [now 31 U.S.C. 483a] that "value to the recipient" need be pecuniary value. That is but one of the factors that the Commission had to take into account, and * * * the Commission may in its discretion determine what weight should be placed on each of the factors.

Under Bureau of the Budget Circular A–25, para. 5(b) (Pet. App. C–1, C–4), fees for special services imposed by regulatory agencies must not exceed the total cost of providing the services. Cognizant of the overriding statutory objective of making the agency's work "self-sustaining to the full extent possible," the Commission set forth its total costs of regulating cable television and arrived at fees aimed at recovering these costs. With respect to its consideration of the value received by cable television systems, the Commission explained (Pet. App. B–6):

> We fully recognize that the factors we have used may not wholly or precisely reflect "value to the recipient." But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard. Revenues of our broadcast licensees in 1968 approximated 3.5 billion dollars. * * * In the same year, CATV system revenues approximated $220,000,000 * * *. Obviously, these figures are the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations to the persons and companies receiving them. Nevertheless, they do serve to place in perspective the very limited extent to which the Commission has considered the "value to the recipient" factor in establishing the fee schedule adopted herein.

Petitioner's contention that cable system operators generally disapprove of the Commission's regulations and therefore do not benefit from them is unsound. As the court stated, the inquiry under 31 U.S.C. 483a is not whether those regulated agree with the regulators, but rather "whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission" (Pet App. A–18). The fees imposed are consistent with the congressional standards contained in 31 U.S.C. 483a, and the court's decision affirming those fees is consistent with both the statute and prior judicial holdings.

2. Petitioner urges that the decision below conflicts with the decision of the District of Columbia Circuit in *New England Power Co.* v. *Federal Power Commission*, 467 F. 2d 425 (set forth at Pet. App. D–1 to D–13), setting aside certain annual fees imposed by the Federal Power Commission on electric power utilities and natural gas companies subject to its jurisdiction. The Solicitor General, on behalf of the Federal Power Commission, has filed a petition for a writ of certiorari seeking review of that decision. *Federal Power Commission* v. *New England Power Co., et al.*, No. 72–1162. The nature of the FCC's regulation of the broadcast and CATV industries is sufficiently different from the nature of the Federal Power Commission's regulation of the electric power and natural gas industries to make detailed comparison of the respective benefits bestowed by the different

regulatory agencies difficult;[4] the cases are thus distinguishable on their facts. In view of the significant benefits accruing to the CATV industry from federal regulation and identified by the FCC in its opinion, certiorari can appropriately be denied in this case regardless of the ultimate disposition of the *New England Power* case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

THOMAS E. KAUPER,
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JOHN W. PETTIT,
General Counsel,

JOSEPH A. MARINO,
Associate General Counsel,

CHARLES M. FIRESTONE,
Counsel,
Federal Communications Commission.

MARCH 1973.

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[4] The most fundamental factual distinction between the two cases is that the broadcast and CATV industries make use, either directly or indirectly, of the public's electromagnetic spectrum, whereas the electric power and natural gas industries make no comparable use of public property. Use of the public's airwaves in itself shows that the broadcast and CATV industries have benefited from federal regulation in a manner different from the public at large.

[5] In the alternative, the Court may wish to hold this case pending its decision with respect to the petition in *New England Power Co., supra.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ADDITIONAL REASON FOR GRANTING THE WRIT

On February 19, 1970, the Federal Communications Commission released a Notice of Proposed Rule Making in Docket 18802, 21 F.C.C. 2d 502 (1970). It proposed fees to be exacted from CATV operators in the annual amount of thirty cents per subscriber. The Notice stated that the proposed fees were based upon "the direct and indirect cost" of regulating the CATV industry and the "value to the recipient of the privileges granted" through

that CATV regulation. (App. B-3)

Comments on these rule making proposals were due from interested parties by April 20, 1970. However, the Commission in its rule making failed to provide interested parties with insight on how the proposed CATV fees were established, leaving NCTA and others in the dark for purposes of filing informed and detailed comments.

Because of the opaque Commission Notice, NCTA believed it was imperative to have additional information relating to the basis of the Commission's proposed CATV annual fee schedule. On March 2, 1970, NCTA requested permission to inspect certain documents related both to the Commission's "direct and indirect cost" of CATV regulation and the "value to the recipient" of that regulation. The basis for such request was the Freedom of Information Act of 1966 (5 U.S.C.§ 552) and Section 0.461 (a) of the Commission Rules (47 C.F.R. 0.461 (a)). The Commission's Executive Director, after extensive delay, refused NCTA's request and did not make available any of the requested documents. After more delay this refusal was totally upheld by the Commission itself on the day before the deadline for filing comments, April 20, 1970.

On May 1, 1970, NCTA brought suit against the Commission under the Freedom of Information Act asking the U.S. District Court for the District of Columbia to affirm NCTA's right to inspect the documents. On May 21, 1970, ten days after the final date for submission of comments in the Commission's fee rule making proceeding, the Commission filed with the District Court a Motion to Dismiss or in the Alternative for Summary Judgment. Attached to the Motion of May 21, 1970,

was an affidavit of its Executive Director which alleged that circumstances had changed which made inappropriate a full denial of NCTA's information request. Access to several of the requested documents was offered to NCTA but the Commission continued to refuse to provide, in addition to certain "cost" materials, any of the requested documents relating to the issue of "value to the recipient" on the grounds that they encompassed vast numbers of confidential financial statements, confidential staff memoranda and various trade publications. The Commission also argued that inspection of this information would be denied because it could not be identified and assembled without unreasonable expenditures of Commission manpower.

The District Court held two hearings at which the Commission's Executive Director testified to both a lack of such requested documents relating to "value" and a claim that, in any event, any such documents were confidential.

On July 31, 1970, following the hearings, the District Court, through an oral ruling from the bench, granted the Commission's Motion for Summary Judgment. After filing a motion to clarify the basis for the District Court's decision, which was denied, NCTA filed an appeal on October 1, 1970 with the United States Court of Appeals for the District of Columbia Circuit. NCTA argued, among other things, that the Commission's bare declarations as to lack of possession of requested documents accompanied by claims that the same documents were exempt were an improper basis for the District Court's decision.

On April 17, 1973, the Court of Appeals reversed the decision of the District Court in National Cable Television Association, Inc. v. Federal Communications Commission, No. 24,786, (C.A.D.C.). (Supplemental Appendix) The Court held that the Commission must specify what documents it has, if any, related to the determination of "value to the recipient" of the Commission's CATV fees. Those documents which exist would have to be made available unless the District Court found them to be within the limited exemptions of the statute.

The Court found first that the Commission's Notice of Proposed Rule Making in Docket 18802 in 1970 was inadequate on its face for purposes of determining the factors of "value to the recipient" and direct and indirect cost. The Court stated:

> "After setting forth this generalized explanation of its approach, however, the Commission failed to supply specifics, either as to the facts from which it had reasoned or as to the mechanical steps it had taken in deriving the final schedule." (Footnote omitted)
>
> "Without data concerning the Commission's costs, it is not possible to determine the basis upon which the Commission allocated its direct and indirect costs among the regulated industries. Without disclosure of the final amount the Commission intended to recover from each industry, it is not possible to determine what, if any, noncost adjustments were made and whether the final schedule had any relation to the cost allocation. And without a definition and

> qualification of 'value to the recipient' it is not possible to determine why and how the Commission might be deviating from a pure system of cost allocation. Thus, the Commission insulated itself from external criticism of its method and rationale, leaving nothing open to challenge except the legality of its result. (Footnote omitted) (Supp. Appendix, p.p. 5-6).

Throughout its decision the Court of Appeals expresses a concern that the Commission may not have possesed a substantive basis on the factor of "value to the recipient" to the CATV industry. The claim by the Commission that the documents requested related to "value" to the CATV industry were unidentifiable was viewed with skepticism. The Court said:

> Where rulemaking proceedings have taken place, the agency has, by definition, already identified its supporting documents, indeed, it would be a most reasonable practice for the agency to retain the documents as a group or index them for future retrieval. It would be most difficult to rebut the presumption that the agency would be able to produce the documents at least until the validity of its rule has been finally adjudicated in the courts. (Footnote omitted). (Supplemental Appendix, pp. 17-18).

And further:

> In the present case the Commission has refused either to state that it did not make use of a mass of financial documents or to identify them. In fact, the District Court openly invited the former response

> from the Commission witnesses, but they repeatedly asserted that there was a documentary basis for the Commission's action, although it had not been identified in the notices of rulemaking. (Footnote omitted). (Supp. Appendix, p. 18)
>
> But there remains a substantial factual issue as to whether the Commission relied on trade publications and confidential reports, rather than vague concepts of the profitability of its regulated industries, in preparing its fee schedule. On remand, the Commission should be required to specify by relevant category and sub-category, which--if any--of these materials it used. (Supp. Appendix, p. 19)

Thus, in determining the impropriety of the Commission's wholesale denial of the requested information on "value", the Court of Appeals made observations relevant to the grant of a writ of certiorari by this Court.

The Court decision exposed the Commission's less than good faith efforts to comply with the statute through a combination of inaction,

misleading statements and delay.1/ Such substantial hinderance prevented NCTA from filing fully detailed and informed comments on

---

1/ The Court stated in fn. 11 of its opinion:

> The Commission's administrative processing of the NCTA's request deserves some comment. Although the right to inspect documents is not dependent on need, the speed of the agency's response may drastically affect the requesting party's ability to participate in a pending agency proceeding. In the context of a 30-day comment period related to a rule making proceeding, the Act's requirement that production be "prompt" becomes critical.
>
> The Commission, however, took approximately 23 days to issue a total refusal. Moreover, it relied in part on a claim that some of the documents were the property of the Bureau of the Budget, yet it violated its own regulations mandating that in such a case the request be forwarded to the appropriate agency.
>
> We find that all of this particularly troublesome in view of the fact that the Commission produced the documents requested in a majority of the NCTA's categories before moving for summary judgment. (Supp. Appendix, pp. 7-8)

the CATV fee schedule during the rule making process. Moreover, depriving NCTA of any information on the factor of "value", the most critical issue in the decision of Clay Broadcasting Corp. v. F.C.C.,,(App. A), greatly hampered NCTA's presentation of argument before the Fifth Circuit.

The Fifth Circuit's decision, insulated to such extent from information on value, should be examined in light of the conflict in New England Power Co. v. Federal Power Commission, decided in the District of Columbia jurisdiction. (App. D-1)

In the Freedom of Information case, the Court of Appeals had to examine the Commission's Notice of Proposed Rule Making in Docket 18802 and the statements of Commission staff to determine the availability and the identifiability of the requested documents on "value to the recipient." The resulting opinion of the Court leaves in serious question whether the Commission, in fact, has any such documents beyond statements of individual CATV systems' profitability. Absent these documents it is difficult to imagine either Court of Appeals finding that the Commission had fulfilled the statutory basis for promulgating agency fees as set forth in the Independent Offices Appropriation Act.

CONCLUSION

For these additional reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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April 27, 1973

SUPPLEMENTARY APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,786

NATIONAL CABLE TELEVISION ASSOCIATION, INC. APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeal from the United States District Court
for the District of Columbia

Decided April 17, 1973

Judgment entered this date ←

Charles S. Walsh, with whom *Gary L. Christensen* was on the brief, for appellant.

Leonard Schaitman, Attorney, Department of Justice, with whom *L. Patrick Gray, III*, Assistant U.S. Attorney at the time the brief was filed, *Thomas A. Flannery*, U.S. Attorney at the time the brief was filed, and *Walter H. Fleischer*, Attorney, Department of Justice, were on the brief, for appellee. *Richard E. Wiley*, General Counsel, Federal Communications Commission at the time the record was filed, *John H. Conlin*, Associate General Counsel, Federal Communications Commission, and *Robert V. Zener*,

Attorney, Department of Justice, also entered an appearance for appellee.

Before: BAZELON, *Chief Judge*, ROBINSON, *Circuit Judge*, and WILLIAM J. JAMESON,* *Senior U.S. District Judge for the District of Montana.*

Opinion for the Court filed by *Chief Judge* BAZELON.

BAZELON, *Chief Judge*: This appeal involves the meaning of the requirement under the Freedom of Information Act that documents be "identifiable" before disclosure is required.[1] On March 2, 1970, the National Cable Television Association (NCTA) requested that the Federal Communications Commission allow inspection of several classes of documents that related to a proposed Commission rulemaking. When the Commission refused, the NCTA brought this suit in the District Court for a stay of the rulemaking and for an order to produce the documents.

Immediately before the hearing for preliminary relief in the District Court, but after the period allowed by the Commission for comments on the rules, the Commission filed a motion and memorandum alleging that "circumstances" had changed, proffering a number of the documents theretofore denied, and requesting dismissal or summary judgment.

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* Sitting by designation pursuant to Title 28, U. S. C. § 294 (d).

[1] The Freedom of Information Act, 5 U.S.C. § 552 (1970), requires that each agency publish or make available certain classes of information. *Id.* §§ 552(a) (1), (2). All other information covered by the Act must be available for inspection in accordance with § 552(a) (3), which states:

> [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person.

The District Court denied the motion for preliminary relief and no appeal was noted.[2] It held two hearings, received testimony from Commission staff members, and granted summary judgment for the Commission on the following oral statement:

> To me, what you are seeking are the work papers and internal memoranda of this agency to which I do not believe you are entitled. What you want are the tapes, the yellow work sheets and possibly to pick somebody's brain. I do not think you have made out a case.[3]

We reverse. Summary judgment may be granted only if the moving party proves that no substantial and material facts are in dispute and that he is entitled to judgment as a matter of law.[4] To prevail, the defending agency must prove that each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements.

Measured against this requirement, summary judgment was improper. Some of the facts necessary to the Commission's defenses find no support in the evidence and others

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[2] To justify a stay of an agency proceeding pending the litigation of a Freedom of Information Act request, a probability of irreparable injury must be shown. *See* Bannercraft Clothing Corp. v. Renegotiation Board, 466 F.2d 345 (D.C. Cir. 1972); Sears, Roebuck & Co. v. NLRB, No. 72-1425 (D.C. Cir. Oct. 24, 1972). The District Court found that the NCTA had presented "no probative evidence" of such a probability.

The rules were subsequently adopted on July 1, 1970, 35 Fed. Reg. 10,988, and were upheld on review, Clay Broadcasting Corp. v. FCC, No. 71-1621 (5th Cir. July 21, 1972). That, of course, does not affect the NCTA's claim, for the Act requires that the materials be made available to "any person."

[3] Joint Appendix 233.

[4] *See* Semaan v. Mumford, 335 F.2d 704 (D.C. Cir. 1964).

of those facts are directly contradicted by evidence elicited by the NCTA.

I. The Rulemaking Proceeding

On February 19, 1970, the Federal Communications Commission released a Notice of Proposed Rule Making which set forth an alteration—and substantial increase—in its license "fee schedule."[5] The February Notice proposed extension of fees beyond applicants for licenses to also include operators of community antenna television (CATV) systems and users of the Commission's radio frequency equipment testing services. It also proposed that the fees, which had previously been designed to reimburse the government for twenty-five percent of the Commission's budget, be raised approximately three hundred percent, thus making the Commission self-supporting.

The result was a predictable storm of protest. At first directed at the Commission's power to impose the fees, the attack eventually shifted to the way in which the proposed scheme would allocate the costs of regulation among the regulated industries and their constituent members. In response to the latter, the Commission issued a Supplemental Notice in March of 1970.[6] The March Notice purported to provide a breakdown of the costs of operating the Commission into the cost of operating each of its six major offices and bureaus.

Taken together, the February and March notices asserted that the proposed schedule would assess each Commission-regulated industry in accordance with a formula that may be briefly described. The cost of operating each office

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[5] Notice of Proposed Rule Making, No. 18,802, 35 Fed. Reg. 3815 (February 18, 1970).

[6] Supplemental Notice, No. 18,802, 23 F.C.C.2d 183 (March 4, 1970).

with direct responsibility for regulating an industry was computed. Next, that part of the cost of each office without a direct regulatory responsibility that could be directly traced to a particular industry was charged to that industry. Then all remaining costs were lumped together and each was assigned a share of that cost equal to its percentage share of the directly assigned costs. Finally, the sum of these items, called the "cost factor," was adjusted to reflect certain intangibles, such as the "value to the recipient" of the privileges granted it by the Commission.[7]

After setting forth this generalized explanation of its approach, however, the Commission failed to supply specifics, either as to the facts from which it had reasoned or as to the mechanical steps it had taken in deriving the final schedule.[8]

Without data concerning the Commission's costs, it is not possible to determine the basis upon which the Commission allocated its direct and indirect costs among the regulated industries. Without disclosure of the final amount the Commission intended to recover from each industry, it is not possible to determine what, if any, noncost adjustments were made and whether the final schedule

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[7] The Commission relied on title V, Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a) (1970), as its authority for applying this formula. That statute states the sense of Congress that any thing of value granted by any federal agency should be self-sustaining, and authorizes agency heads to promulgate regulations to that end. The regulations are "to be fair and equitable, taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." *Id.*

[8] The notices did provide a sketch of the general approach that the Commission followed with respect to each industry and the mechanics of fee collection. Notice of Proposed Rule Making, No. 18,802, 35 Fed. Reg. 3815, ¶¶ 9-14 (February 18, 1970).

had any relation to the cost allocation. And without a definition and quantification of "value to the recipient"[9] it is not possible to determine why and how the Commission might be deviating from a pure system of cost allocation. Thus, the Commission insulated itself from external criticism of its method and rationale, leaving nothing open to challenge except the legality of its result.

The NCTA, as the chief trade association of the CATV industry, wished to file comments concerning the proposed fee schedule. Faced with the opaque notices just described, it requested an opportunity to inspect several categories of documents that the NCTA believed the Commission would have in its files.[10] One category was "the docu-

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[9] This factor could mean a variety of things. The Commission, in its February Notice, stated:

> We have therefore selected different bases for considering "value to the recipient," both for different types of actions within each service and similar types of action among different services, which we believe are fair and equitable. We fully recognize that the factors we have used may not wholly or precisely reflect "value to the recipient." But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our proposed fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard.

The Commission made no attempt to set out its interpretation of this term, or to specify what monetary adjustments resulted from its use.

[10] The original letter requested "the annual and inventory reports of all user charges of the Commission submitted to the Bureau of the Budget on Standard Form No. 4 on or about September 30, 1969," the documents "used to prepare the Standard Form No. 4, report," the "Commission's budgetary *request* for fiscal year 1970, beginning July 1, 1970, *which was submitted to the current sessions of Congress*," including

ments, listings and records used to determine the '"value to the recipient" of the privileges granted' as referred to in the [February] *Notice*." The other categories all related to the facts and reasons that supported the "cost factor."

II. The Documents Sought by the NCTA

As a consequence of the Commission's midnight production of most of the requested materials, after the close of the rulemaking but prior to the first hearing in the District Court, only three of the categories remained to be considered by the Court.[11] Since the District Court's ruling

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supportive documents," and "the Commission's budgetary requests for fiscal years 1970, . . . , and 1969." The italicized language manifests the NCTA's ignorance of internal Commission proceedings discussed below. *See* text following note 13 *infra*.

Finally, the letter stated generally:

> NCTA also requests the right to inspect documents used by the Commission in determining the proposed fee schedules set forth in the Notice of Proposed Rule Making . . . . In particular, NCTA requests the right to inspect the documents and the listings or records used to determine the " 'value to the recipient' of the privileges granted" and "the direct and indirect cost to the Government" of granting and administering those privileges as referred to in paragraph 5 of the Notice of Proposed Rule Making . . . ."

Joint Appendix 49-51.

[11] The Commission's administrative processing of the NCTA's request deserves some comment. Although the right to inspect documents is not dependent on need, the speed of the agency's response may drastically affect the requesting party's ability to participate in a pending agency proceeding. In the context of a 30-day comment period related to a rulemaking proceeding, the Act's requirement that production be "prompt" becomes critical.

The Commission, however, took approximately 23 days to

does not indicate the grounds on which it based its grant of summary judgment, we must examine the record on each of these categories.

A. The Two "Cost Factor" Categories

The February Notice stated that the total cost of regulation was that stated in the Commission's budget for the relevant year.[12] Thus, the NCTA's request to inspect documents was phrased in terms of classes of documents that supported the budget and the allocation of budgeted costs among the regulated industries. The first two categories requested were:

> 1. The supportive documents used to arrive at the Commission's budget for fiscal year 1971;
>
> 2. The documents, listings and records used to determine the "direct and indirect cost to the Government" of the privileges granted the CATV industry for fiscal year 1971.[13]

Access to the first group of documents would permit the NCTA to check the accuracy of the Commission's breakdown of its costs. Access to the second would enable it to determine which parts of the budget had been assigned to

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issue a total refusal. Moreover, it relied in part on a claim that some of the documents were the property of the Bureau of the Budget, yet it violated its own regulations mandating that in such a case the request be forwarded to the appropriate agency. *See* 47 C.F.R. § 0.451 (b) (3) (1972).

We find all of this particularly troublesome in view of the fact that the Commission produced the documents requested in a majority of the NCTA's categories before moving for summary judgment.

[12] Notice of Proposed Rule Making, No. 18,802, 35 Fed. Reg. 3815, ¶ 3 (February 18, 1970).

[13] *See* Letter of March 2, 1970, from Gary L. Christensen to Max D. Paglin, Executive Director, F.C.C., at Joint Appendix 49.

the cost of CATV regulation, and compare them with the budget breakdown to determine whether all of the costs assigned to CATV were consistent with the budget. By adding together the costs listed under the second category, the NCTA would be able to challenge both the fairness of the charge and the accuracy of the Commission's addition.

In response to the first item, the Commission provided the NCTA with a copy of its budget "request," a document prepared for the Bureau of the Budget. The "request" itemized the Commission's proposed expenditures for fiscal year 1971, but requested fifty percent more money than the Bureau finally cleared for submission to Congress as the "budget." The Commission produced nothing in response to the second item.

At the hearing in the District Court, the Commission produced the head of its budget office for examination by the NCTA. Asked for an explanation of the Commission's procedures, he testified that he had prepared the budget "request" from a variety of documents submitted by the Commission's various organizational units, in accordance with a memorandum of instruction from the Commission itself. He further testified that these documents were still in the possession of the Commission, but he argued that these were not "supporting" documents to the final budget, apparently on the theory that the budget "request" had intervened. The latter, he said, "is really the supportive document" for the Congressional budget.

The second request was for the documents that supported the assignment of part of the Commission's budgeted costs to CATV. The Commission's witness testified that there were no such documents. He said that he had compiled the relevant data from the budget by using yellow sheets of paper and adding machine tapes, and had preserved only the final totals. These, he testified, were the figures included in the March Notice. The NCTA

avowed that it could not duplicate the Commission's figures by this means. While we can sympathize with this statement, for the reason that there appear to be contradictions in this account of the Commission's procedures,[14] we think that the Commission has adequately shown that there exist no documents in the category specified in the second request.

B. The "Value to the Recipient" Category

The Commission produced the official who had originally refused the NCTA's request for inspection to testify on the request for "documents, listings and records used to determine the 'value to the recipient' of the privileges granted" by the Commission. Adhering generally to the affidavit he had filed in support of the motion for summary judgment, this witness testified that the Commission itself, after receiving from its budget office a figure for the total "cost factor" for each industry, worked from this to obtain the fee schedule by taking account of statutorily designated factors, including "value to the recipient."

He stated that, as set forth in his letter to the NCTA on behalf of the Commission, the Commission had relied upon "the knowledge and financial aspects of the communications industry acquired over the years from vast numbers of confidential financial statements, confidential staff mem-

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[14] One Commission witness testified that the direct costs of CATV regulation were $678,000, and that CATV had been assessed no indirect costs. The March Notice, however, stated that the costs directly and indirectly attributable to CATV regulation amounted to $1,145,400. The witness explained that the latter figure also included CATV's share of unassigned costs.

This explanation seems inadequate because the March Notice included separate amounts for the operation of offices not directly responsible for regulating any particular industry. This seems to indicate that the $1,145,400 excluded unassigned costs.

oranda, and various trade publications." While asserting that the Commission had only relied on them "in part" for its noncost adjustments, he did testify that the Commission still had these documents. He added that the NCTA had been denied them because the request "was so indefinite that it was difficult to identify and assemble without totally unreasonable expenditure of Commission manpower." Also, he said, some of the documents were confidential. Elaborating with respect to the internal memoranda, he said:

> [Q. W]ith respect to the approach taken, the degree used, is there a conclusion reached [in the memoranda] as to the approach as to the degree of value with respect to the CATV industry, all of them mentioned in the Commission's rule making proposal? Were any factual conclusions reached that were put on paper?
>
> A. It's very difficult to distinguish between actual conclusions and an opinion of the writer, an advocacy of a certain point of view. This is a very sensitive program and there were some very strongly held views amongst the staff and amongst the Commissioners; and *these internal staff memoranda contain these views and these advocacies.*[15]

Insofar as the NCTA's request went to the trade publications and the "confidential financial statements," no further testimony was taken. Since the witness had testified that no "financial statements" had been received from the CATV industry, it is possible that the NCTA does not want to inspect them. Indeed, the Commission's affidavit broadly asserted that CATV is "NCTA's sole concern"—although this could either be a representation of NCTA's position or a claim, contrary to the Act, that NCTA needed a more direct interest to support a right to inspection.

But, since the NCTA could hardly comment on the ad-

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[15] Joint Appendix 217 (emphasis added).

justments for "value to the recipient" without knowing the comparative status of other assessed industries, the NCTA's request seems more likely to encompass all of the Commission's supporting documents. And, since the actual wording of the request included all of the documents, the question whether they must be produced remains.

III. Disposition by Summary Judgment

In response to the Commission's motion for summary judgment, the District Court ordered the Commission to produce witnesses who could testify concerning the Commission's procedures and whether documents existed within the categories requested by the NCTA. It then required the NCTA to examine those witnesses, identify the documents it sought, and show that they were not exempt.

We think this procedure was based on an erroneous construction of the Act's requirements. The Commission could not rest on the blanket allegations of compliance, unidentifiability, and exemption that it made in its motion for summary judgment and supporting affidavit. Nor did the testimony elicited by the NCTA supply the missing evidence. Rather, it further undercut the Commission's position.

The motion for summary judgment should have been denied, and the Commission should have been required to go on and prove the missing elements of its defenses as set forth below. On remand this can be done either in support of a renewed motion or at a trial.

A. Identifiable Records

Apparently ignorant of the Commission's internal operations and filing system, the NCTA identified the requested documents in terms of the functions they had served in the Commission's development of the proposed fee schedule. Thus, before the Commission could comply with the

request, it would have to identify the documents more specifically, as, for example, by name and file number. To do this the Commission would have to retrace the steps taken in the development of the rulemaking notice. The Commission has steadfastly refused to undertake this task, and the ruling of the District Court upheld this refusal.

The Freedom of Information Act does not require that a person identify records by providing the agency with a complete description down to the last detail of title and file number. It states:

> [E]ach agency, on request for *identifiable* records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person.[16]

This language places part of the responsibility for identifying the records on the agency itself. The responsibility of the person requesting the records is that he provide sufficient information to permit the agency to accomplish this duty.[17] Problems of construction arise when we attempt to determine how much effort the requesting party must make, and how much he may leave to the agency,

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[16] 5 U.S.C. § 552(a)(3) (1970).

[17] The Commission relies heavily on a phrase in the Senate Report that states that the records "must be identifiable *by the person requesting them.*" S. REP. No. 813, 89th Cong., 1st Sess. 8 (1965). (emphasis added).

The context in which the phrase appears destroys any support these words appear to provide for the Commission's argument that it has no independent responsibility to identify the documents. The full statement is: "The records must be identifiable by the person requesting them, *i.e., a reasonable description enabling the Government employee to locate the requested records.* This requirement of identification is not to be used as a method of witholding records." *Id.* (emphasis added).

realizing always that he may be required to reimburse the agency for its efforts.[18]

The legislative history provides us little added guidance, suggesting only that we look to our decisions construing the discovery rules applicable in civil cases and advising that, while requests must be "reasonably identifiable," the requirement should not be used as a device to withhold records.[19]

Our earlier cases have taken a pragmatic approach to this problem, attempting to draw lines that comport with the overall purposes of the Act.[20] We think our opinion

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[18] *See* 5 U.S.C. § 552(a)(3) (1970). The NCTA stated that it was prepared to pay such costs in its initial letter of March 2, 1970. *See* Joint Appendix 51.

[19] *See* S. REP. No. 813, 89th Cong., Sess. 8 (1965).

The legislative history indicates that the standards to be applied should correspond generally to the discovery rules applicable to civil suits in the District Courts. *See id.* The 1970 amendments to Rule 33, FED. R. CIVIL PRO., are instructive in this regard. They establish an alternate procedure for answering interrogatories that require the responding party to examine its own records. The responding party now may make the records available for inspection instead of searching out the information himself.

But this rule does not exempt the responding party from all responsibility for identifying documents in his own files. Only if the requesting party can perform that task with equal facility can he be required to cull the responding party's files. In all other cases, even when identification requires the creation of new classes, the responding party must do it. *See* Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp., 55 F.D.R. 354 (1972); 4A MOORE, FEDERAL PRACTICE & PROCEDURE, Advisory Committee Note, Amended Rule 33, ¶33.01 [6], at 33-13 (1971).

[20] *See, e.g.*, Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). Aside from its general purpose of maximizing disclosure, however, the statute adds little help in determining the meaning of "identifiable."

in *Bristol-Myers v. F.T.C.*[21] is controlling in this case. Additionally, it provides guidance in any attempt to articulate more generally the balance to be struck in cases involving attempts to inspect agency documents used to formulate proposed or final rules.

In *Bristol-Myers* the District Court refused to enter an order compelling the Federal Trade Commission to produce documents described and identified by the Company in terms of the function that they served in the development of proposed rules regulating the advertisement of certain drugs. The basis for that ruling was a narrow interpretation of the identifiability requirement in the Act:

> An identifiable record necessarily means a record that is described with sufficient precision in order that by ministerial action of some subordinate the document can be identified and selected out of the files. It does not mean that the head of an agency or his immediate assistant must use judgment in seeking through the file to determine whether a particular document is within the classification asked for. This would be an unreasonable request.[22]

We reversed, and pointed out:

> The F.T.C. can hardly claim that it was unable to ascertain which documents were sought by Bristol-Myers. The Commission relied on certain materials in promulgating its proposed rule, and referred to them in announcing the rulemaking proceeding. These materials are adequately identified in the request for disclosure of the items mentioned in the Commission's Notice.[23]

The Federal Communications Commission now argues, as it did in its motion for summary judgment, that this lan-

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[21] 424 F.2d 935 (D.C. Cir. 1970).

[22] 284 F. Supp. 745, 747 (D.D.C. 1968).

[23] 424 F.2d 935, 938 (D.C. Cir. 1970).

guage is inapplicable in the case before us for the reason that it did not "rely on" or "refer to" any documents in its February and March notices, but to its "knowledge" acquired from documents.[24]

We think that the Commission misreads both our opinion in *Bristol-Myers* and the underlying purpose of our holding there. We did not impose a requirement that the notice directly refer to or rely on the documents to be disclosed. In fact, the request in *Bristol-Myers* did not differ from the request involved here:

> The petition filed by Bristol-Myers with the F.T.C. sought the identification and disclosure of "each item of material, whatever its form or nature, which . . . has contributed to or constitutes" the "extensive staff investigation," "accumulated experience," "available studies and reports" and "other things" referred to in the [Federal Trade] Commission's Notice [of proposed rulemaking.][25]

The scope of the agency's responsibility to identify its own documents may be further delineated by examining a second request by Bristol-Myers, one which we said might present a plausible claim of unidentifiability by the Federal Trade Commission:

> The petition also sought each item which has contributed to or constitutes information concerning the effect of any alalgesic and information concerning the accuracy of appellant's assertions concerning the ef-

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[24] *See* Joint Appendix 200-222.

[25] *Id.* at 938 n.7. The Notice of Proposed Rulemaking, 32 Fed. Reg. 9843 (July 6, 1967), stated:

> In taking this action the [Federal Trade] Commission has considered, among other things, . . .; and on the basis of its accumulated experience and available studies and reports, is of the opinion that the public interest in a Trade Regulation Rulemaking proceeding is specific and substantial [*sic*].

fects of various ingredients of its own analgesic products.[28]

This request undoubtedly extended beyond the documents that the F.T.C. itself possessed. Moreover, it was not apparent that the Commission had at any time either indexed its files in a way that would enable it to locate what it did have, or that it had ever brought the materials together for a common purpose or otherwise acted on them as a group. Thus, the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency.

Once the request has been made as specific as the agency's public statements permit, *Bristol-Myers* teaches: (1) If the agency has previously identified a class or category of documents in the normal course of its affairs, it must produce them in response to a request phrased in terms of the class or category. (2) If the agency has never segregated that class or category, production may be required where the agency may be able to identify that material with reasonable effort.

Even where an agency has previously identified a class of materials, the passage of time may work such changes in the agency's personnel and records that production requires that identification begin anew. In such circumstances, production may be required only if the task imposed on the agency is not unreasonable.

Where rulemaking proceedings have taken place, the agency has, by definition, already identified its supporting documents. Indeed, it would be a most reasonable practice for the agency to retain the documents as a group or index them for future retrieval. It would be most difficult

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[28] 424 F.2d 935, 938 n.8 (D.C. Cir. 1970).

to rebut the presumption that the agency would be able to produce the documents at least until the validity of its rule has been finally adjudicated in the courts.[27]

Finally, *Bristol-Myers* establishes that the specificity with which the agency has identified documents in its public statements is relevant only to the requirement that the request be as specific as reasonably possible. It is not relevant to the question whether the agency can be required to identify and allow inspection of the requested records under section 552(a)(3).[28]

In the present case the Commission has refused either to state that it did not make use of a mass of financial documents or to identify them. In fact, the District Court openly invited the former response from the Commission witnesses, but they repeatedly asserted that there was a documentary basis for the Commission's action, although it had not been identified in the notices of rulemaking.[29]

The NCTA phrased its request as specifically as the Commission's public notices reasonably permitted.

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[27] Rules reviewable under the Administrative Procedure Act *see* 5 U.S.C. § 704 (1970), are to be "held unlawful and set aside" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," among other things. *Id.* § 706.

This limited scope of review does not exclude review of the underlying facts and assumptions upon which the agency acted. The agency has a responsibility to maintain its ability to produce this information at least until final adjudication of the rule.

[28] The question whether documents must be made available under 5 U.S.C. § 552(a)(2), or the due process clause, is not in issue here. *See* Sterling Drug Inc. v. Federal Trade Comm'n, 450 F.2d 698 (1971).

[29] *See* Joint Appendix 200-01.

Accordingly, the Commission should have been required to identify, at least by relevant classes and subclasses, all the documents that it had used to support its proposed rule. Then it should have been required to establish which of those documents were exempt from disclosure under the applicable provisions of the Act.

Much of this has now been done, albeit by the NCTA through its examination of Commission staff members. But there remains a substantial factual issue as to whether the Commission relied on trade publications and confidential reports, rather than vague concepts of the profitability of its regulated industries, in preparing its fee schedule. On remand, the Commission should be required to specify, by relevant category and subcategory, which—if any—of these materials it used.

For the future we think that these matters should be settled through the discovery process as much as possible. The civil rules governing pretrial discovery provide ample tools for use in compelling the agency to identify and disclose the documents it has that fall within the class or category requested.[30] In addition to facilitating the disposition of these cases by summary judgment, this approach will enable the requesting person to narrow his request if he discovers that he wants only a part of the supporting documents that the agency identifies in response to his discovery requests.[31]

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[30] *See, e.g.*, Rules 33, 34, FED. R. CIVIL PRO.

[31] *See* Note, 15 TENN. L. REV. 737 (1972) (Preliminary discovery by oral examination or written interrogatories is available when desired in order to ascertain the existence, description, nature, custody, condition and location of documents or tangible things.")

This approach was taken in Grumman Aircraft Engineering Corp. v. Renegotiation Board, C.A. No. 1595-68 (D.D.C. 1971), on remand from this court's decision, 425 F.2d 578 (D.C. Cir. 1970).

B. The Commission's Exemption Claims

Because of the confusion involved in identifying the documents that existed within the scope of the NCTA's request in this case, the District Court was entirely diverted from the necessary inquiry into the exemptions now claimed by the Commission. Indeed, the oral ruling of the District Court denied the NCTA's entire request on the ground that the "yellow work sheets" and adding machine tapes used to prepare the "cost factor" from the budget were exempt. Yet, so far as we can determine, these were the only "documents" that the hearing showed not to exist.

On the record before us, we perceive two possible exemptions that might justify withholding part of the material that the Commission admits it possesses. Under the applicable case law, however, neither would justify nondisclosure on this record, and the Commission must be required to establish the exemptions on the remand.

1. Intra-agency Memoranda

The Commission asserted below that inspection of the memoranda used in the preparation of the budget "request" and the memoranda used to determine the "value to the recipient of the privileges granted" could not be ordered. It pointed to section 552(b)(5) of the Act, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[32] The District Court made no further inquiry into the matter, and the Commission produced nothing except a flat assertion that the documents "contained" policy arguments and were "confidential."[33]

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[32] 5 U.S.C. § 552(b)(5) (1970).

[33] *See* text at note 15 *supra*.

Both our own cases [34] and the Supreme Court's recent holding in *Environmental Protection Agency v. Mink*[35] make it clear that this is insufficient. In *Mink* the Supreme Court said:

> Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion.[36]

This distinction is particularly important here, where the memoranda at issue relate to the development of a fee schedule said to have been derived from cost data and collections of financial reports. The Commission must show that any factual matter in the memoranda is so "intertwined with policymaking processes" that it would violate the purpose of the exemption to disclose it.[37]

Mink went on to point out that the District Court may use a variety of tools in making this determination, including, but not limited to, *in camera* inspection of some or all of the documents.[38] Additionally, we note that the District Court in the Southern District of New York has recently resolved such a Freedom of Information Act case

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[34] *See, e.g.*, Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969).

[35] 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973).

[36] *Id.* at 4207.

[37] *Id. See* Mink v. Environmental Protection Agency, 464 F.2d 742, 746 (D.C. Cir. 1972).

[38] 41 U.S.L.W. at 4207.

by appointing a Master and delegating the task of *in camera* inspection to him.[39]

2. Confidential Financial Statements

It is equally unclear whether the "confidential financial statements" that the Commission allegedly used in determining "value to the recipient of the privileges granted" fall within the scope of the Act's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[40] The exemption does not protect all data contained in such filings, but only that information which cannot be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information.[41]

In those cases in which the party that filed the statement is so large or unique that disclosure of the data itself would destroy the confidentiality of that party, it is conceivable that total nondisclosure would be justified. But the Commission's witnesses testified that there are many thousands of such statements filed over a long period of time, and it seems highly improbable that the Commission will be able to establish that they must all be withheld.

This, too, will be an appropriate subject for the District Court on the remand, armed with the flexible tools cited by *Mink*. In particular, the Court should take note of the

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[39] Frankel v. Securities & Exchange Comm'n, 336 F. Supp. 675 (S.D.N.Y. 1971), *reversed on other grounds*, 460 F.2d 813 (2d Cir.), *cert. denied*, 41 U.S.L.W. 3188 (Oct. 10, 1972).

[40] 5 U.S.C. § 552(b)(4) (1970).

[41] *See, e.g.* Fisher v. Renegotiation Board, No. 71-1031 (D.C. Cir. Nov. 10, 1972); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 425 F.2d 578 (D.C. Cir. 1970).

Supreme Court's suggestion that representative samples of the statements be examined, rather than the thousands that apparently exist.[42] But, before this examination is undertaken, the Commission should be required to state which, if any, of these documents were used in the preparation of its rules. As we have pointed out, the scope of the NCTA's request was coextensive with the scope of the Commission's documentary basis for its rules.

Reversed and remanded.

[42] 41 U.S.L.W. at 4207.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 464 F.2d 1313 (1972).[1] The *Re-*

[1] The decision was included as Appendix A to Petitioner's Petition for a Writ of Certiorari (hereinafter referred to as (Cert. A.)).

Materials provided in the Single Appendix with both parties agreement shall be designated as (A.), while materials at the end of the Petitioner's brief shall be designated (Pet. App.).

port and Order in Docket 18802 of the Federal Communications Commission (A.35) is reported at 23 F.C.C. 2d 880 (1970).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 21, 1972. A petition for rehearing was denied on October 2, 1972. A petition for certiorari was filed on January 2, 1973 and was granted by this Court on May 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may recover the full cost of its regulation of the CATV industry via the imposition of annual fees on all CATV systems where those fees bear no relation to the statutory standard of "value to the recipient" or any special benefits conferred on particular CATV systems.

2. Whether the formula of allocation devised by the Commission for assessing the annual charges to individual CATV systems is discriminatory, inequitable and contrary to the statutory standards of Title V of the Independent Offices Appropriations Act.

STATUTES AND REGULATIONS INVOLVED

Title V of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a); Bureau of the Budget Circular No. A-25 of September 23, 1959; *Report and Order* in Docket 18802, in the Matter of Amendment of Subpart C of Part 1 of the Commission's Rules relating to fees, 23 F.C.C. 2d 880 (1970); and the *Memorandum Opinion and Order* denying reconsideration,

28 F.C.C. 2d 139 (1971), set forth in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner, National Cable Television Association, Inc. (hereinafter NCTA) is the national trade association for the CATV industry and in that capacity represents the majority of CATV systems in the United States. NCTA seeks review of the decision of the United States Court of Appeals for the Fifth Circuit holding that the Federal Communications Commission's annual schedule of fees imposed on CATV systems in 1970 is a reasonable exercise of the authority delegated to the Commission by Congress.

On February 19, 1970, the Federal Communications Commission (hereinafter FCC or Commission) released a *Notice of Proposed Rulemaking* in Docket 18802, 21 F.C.C. 2d 502 (1970) (A-1), in which it proposed to radically revise its then existing fee schedule for persons subject to its jurisdiction.[2] As proposed in the *Notice,* CATV systems, for the first time, would be included in the Commission's schedule of fees. These fees would include filing fees and a significant annual fee for CATV systems. As authority for the new filing fees and annual fee schedule related to CATV systems, the Commission cited Title V of the Independent Offices

[2] In its *Report and Order* in Docket 14507, 25 Pike & Fischer, R.R. 1559 (1963), the Commission had provided for a schedule of filing fees which became effective on March 17, 1964. The fees established therein were limited to charges established for voluntary filing of applications for television and radio stations, common carrier services, safety and special services, and commercial and amateur radio licensing. They amounted to approximately 25 percent of the Commission's budget. CATV was not included at that time.

Appropriations Act of 1952, 65 Stat. 290; 31 U.S.C. § 483 (a).

The Commission admitted the newness of its proposed fee approach, stating:

> The fee schedule being proposed herein represents a departure from the existing schedule in several major respects. The present schedule is limited to nominal fees upon the filing of applications for various types of authorizations for radio stations, operators' licenses, and communications common carriers. The approach in the newly proposed fee schedule, in addition to imposing fees in various areas where none now exist, is more closely and literally tied to the criteria stated in the above-cited Appropriations Act. Thus, the proposed fees are designed to make the Commission "self sustaining to the full extent possible. . . ." in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. (A. 4).

The Commission further declared that the rationale for the formulation of the new fee schedule gave explicit recognition, in appropriately varying degrees, to the "value to the recipient" of the privileges granted, as well as the public interest served and the "direct and indirect cost to the Government."[3]

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[3] These are the legal criteria for determining agency fees as contained in Title V of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a). This law provides the statutory authorization for the promulgation of fee schedules by an administrative agency. Acting under the provisions of the Appropriations Act, the Bureau of the Budget issued its Circular No. A-25 on November 5, 1953, which directed agencies to establish policies to "provide a system of fair and equitable fees which, taking account of the value to the recipient and the public policy and interest served, shall recover, to the full extent possible, the aggregate cost incurred in the conduct of these activities." S. Report 1467, 84th Cong., 2nd Sess. 7 (1956). The Bureau revised Circular No. A-25 which it reissued September 23, 1959.

NCTA, and other interested parties, complained to the Commission that it was virtually impossible to submit cogent comments to the *Notice* on the annual fee proposals because of the paucity of information about how the statutory considerations, particularly "direct and indirect cost" and "value to the recipient," were incorporated in the proposed new CATV annual fees. In response to this request the Commission released a *Supplemental Notice.*[4] (A. 30).

On March 2, 1970, NCTA requested from the Executive Director of the Commission the right to inspect seven classes of documents in the Commission's files under the Freedom of Information Act of 1966, 5 U.S.C. § 552 (1966), and Section 0.461 (a) of the Commission Rules and Regulations, 47 C.F.R. 0.461 (a). The most important category of information requested was "the documents, listings and records, used to determine value to the recipient of the privileges granted" as referred to by the Commission in the *Notice.* The other categories all related to the factual support for the "cost" considerations in the Commission's proposals. NCTA made clear that it planned to use the requested documents and records in preparing its written comments on the proposed CATV fees.[5] (Pet. App. 3a)

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[4] While the Commission declared that the *Supplemental Notice* "contains information as to the costs of the Commission's various activities," the *Supplemental Notice,* in fact, only contains a single line providing an overall dollar and percentage cost figure for the Commission's regulation of the CATV industry.

[5] On March 25, 1970, the Commission's Executive Director denied access to each request. (Pet. App. 5a) NTCA's request for the FCC's budgetary estimates for fiscal years 1969, 1970, and 1971 was denied, and NCTA was referred to the Bureau of the Budget. No answer was given to the request for the supportive documents used to prepare the FCC's budgetary request for the fiscal year 1971. While referring to Section 0.451(b) (3) of the

In denying NCTA's request for access to the documents used to determine value or benefit to the CATV industry from Commission regulation the Commission's Executive Director stated:

> With respect to the value to the recipient of the privileges granted, the Commission and its staff relied upon their knowledge of the financial aspects of the communications industry acquired over the years from a vast number of confidential financial statements, confidential staff memoranda and various trade publications. Consequently, your blanket request to inspect all of this information must be denied because it cannot be identified and assembled without totally unreasonable expenditures of Commission manpower. (Pet. App. 5a-6a).

Following the Commission's total denial of NCTA's petition to review the Executive Director's decision on April 16, 1970,[6] NCTA brought suit against the Commission in the United States District Court for the District of Columbia on May 1, 1970 under the Freedom of Information Act, 5 U.S.C. § 552, asking that court to affirm NCTA's right to inspect the documents requested.[7]

FCC Rules as the basis for their denial of some requests, the FCC failed to forward the request to the Bureau of the Budget as required by their own regulations. In response to NCTA's request for the documents, listings and records, used to determine the "direct and indirect cost to the Government," the FCC said it would provide nothing more than its *Supplemental Notice* released March 4, 1970. The Executive Director also totally denied NCTA's request for the documents, listings and records used to determine the "value to the recipient of the privileges granted."

[6] *Memorandum Opinion and Order* in Docket 18802 (A. 32).

[7] On the same day, NCTA filed with the FCC a "Petition to Stay" the fee schedule which was denied on April 30, 1971. (A. 140)

On May 21, 1970, after the FCC's rulemaking proceeding was closed, the Commission filed with the District Court a Motion to Dismiss or in the Alternative for Summary Judgment and an accompanying affidavit of its Executive Director.[8]

The District Court held two hearings on the motion at which the Commission's Executive Director testified to both the nonexistence of the requested documents relating to value or benefit and a claim that, in any event, any such documents that did exist were confidential. On July 31, 1970, following the hearings, the District Court, through an oral ruling from the bench, granted the Commission's Motion for Summary Judgment.[9]

While the controversy over the Commission's denial of the requested information continued, the Commission issued its *Report and Order* in Docket No.

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[8] The Executive Director's affidavit simply alleged that circumstances had changed since the original denial which made it possible for NCTA to inspect the documents used to prepare the annual inventory report for 1969. Also offered for inspection were the FCC's budget estimates submitted to the Congress for the years 1969, 1970 and 1971. The Commission continued to maintain that the documents used to arrive at "direct and indirect cost" and "value to the recipient" were not available for review.

[9] On October 1, 1970, NCTA filed an appeal with the United States Court of Appeals for the District of Columbia Circuit. NCTA argued, among other things, that the Commission's bare declarations as to lack of possession of the requested documents related to both "direct and indirect costs" and "value to the recipient", accompanied concurrently by claims that the same documents were exempt was an improper basis for the District Court's decision.

18802 on July 1, 1970, establishing its new fee schedule, 23 F.C.C. 2d 880.[10] (A. 35).

The Commission admitted in its *Report and Order* that the new fee schedule, including the imposition of annual fees, differed significantly from the prior fee schedule and that the fees adopted were clearly calculated to permit the Commission to sustain its entire annual budgetary request. (A. 37-38).

The *Report and Order* established the following general categories of fees (47 C.F.R. 1.1101-1.1120): First, the fees in Docket 14507, *supra*, for filing applications for radio stations, radio operator licenses or common carrier activities, were generally increased; second, a new charge was levied for grants of broadcast license applications in addition to the filing fee; third, an annual charge was imposed upon broadcast stations and common carriers; fourth, the Commission imposed for the first time a schedule of fees on CATV system operators.

The new CATV fees were divided into two categories. First, filing fees were imposed in connection with Commission-mandated notices filed by CATV systems regarding the carriage of television stations, and petitions filed by CATV systems seeking the waiver of or relief from Commission regulations. 47 C.F.R. 1.1116(a). Second, an annual charge was imposed on

[10] The Commission rejected all arguments against the principle of the annual CATV fee. The Commission's schedule of CATV fees, with two exceptions, remained identical to those set forth in the *Notice of Proposed Rulemaking*. The modifications made were adverse to the industry. The Commission in its *Report and Order*, changed one special filing fee and eliminated from its proposal the exemption of small CATV systems from the annual fees. (A. 64-65)

all CATV systems calculated at the rate of 30 cents per system subscriber. 47 C.F.R. 1.1116(b).[11] The annual assessment was levied to recoup the Commission's full CATV regulatory appropriation from Congress without regard to whether any work or other benefit had been performed for a particular CATV system during that year.

Based on the Commission's estimate of 3,750,000 subscribers in the CATV industry in fiscal year 1969-70, the Commission expected to recover $1,125,000 from CATV operators in annual fees in the first year.[12]

The Commission's annual CATV fees were expected to recover in excess of 95% of total fees collected from the CATV industry. The remainder was to come from the aforementioned filing fees. Total fees from CATV in the first year were estimated at approximately $1,150,000.[13]

Following the Commission's denial of reconsideration of its *Report and Order,*[14] NCTA and the Cali-

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[11] This annual fee would rise to 40 cents per subscriber under a new fee schedule proposed by the Commission on December 27, 1972 in the *Notice of Proposed Rule Making* in Docket 19658. 38 F.C.C. 2d 587 (1972).

[12] On January 1, 1973 estimates show, the industry had over 7,000,000 CATV subscribers.

[13] The effective date of both the filing and annual CATV fees was set at August 1, 1970. Under Section 1.1116(a), 47 C.F.R. 1.1116(a), all applications, petitions and notices received on and after August 1, 1970, were subject to the new fees.

[14] On April 1, 1970, the Commission issued a *Memorandum Opinion and Order,* 28 F.C.C. 2d 139 (1971), denying a petition for reconsideration directed against the CATV annual fee schedule filed on behalf of approximately 200 existing or currently proposed CATV systems. (A. 89)

fornia Community Television Association, Inc., along with several interested broadcast parties, sought judicial review of the Commission's new fee schedule. NCTA's principal argument was that the criteria established in Title V of the Independent Offices Appropriations Act did not provide the authority for the imposition of annual fees against the CATV industry. All of the appeals were consolidated in the United States Court of Appeals for the Fifth Circuit. In a decision rendered on July 21, 1972, in *Clay Broadcasting Corp.* v. *Federal Communications Commission*, 464 F. 2d 1313, that court upheld the Commission in all respects. (Cert. A-1). With particular reference to the imposition of an annual fee on CATV systems, the court concluded that CATV benefits from the Commission's regulation of CATV differently than the public at large, this being sufficient to justify the imposition of the annual fee.[15]

NCTA filed a petition for a writ of certiorari with this Court on January 2, 1973.

On April 17, 1973, the Court of Appeals for the District of Columbia reversed the Freedom of Information decision of the United States District Court in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, No. 24,786, (C.A.D. C.). The Court held that the Commission must specify what documents it has supporting both the Commission's 1970 CATV budget request to Congress and those related to the determination of the benefit or "value to the recipient" of the Commission's CATV regulation if they exist. Those documents

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[15] NCTA's petition for rehearing to the Court was denied on October 2, 1972.

which exist would have to be made available unless the District Court found them to be within the limited exemptions of the statute.[16]

The Court found that the Commission's *Notice of Proposed Rulemaking* in 1970 was inadequate on its face for the purpose of determining the factors of "value to the recipient" and "direct and indirect cost" required under the Appropriations Act. (Supp. App. 5-6).

SUMMARY OF ARGUMENT

The sole statutory authority for the imposition of fees by the Federal Communications Commission is contained in the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a). That statute, as interpreted by the Budget Bureau Circular No. A-25 of 1959, permits a fee to be charged where there is an "identifiable recipient" of a "measurable unit" of service from which he obtains a "special benefit." Furthermore, the Act requires that the fee itself must be determined on the basis of "direct and indirect cost to the Government, value to the recipient, [and] public policy or interest served." (A. 151) The Commission's imposition of an annual fee of 30 cents per subscriber on all CATV systems in the country fails virtually every one of these requirements.

The Commission's regulation of the CATV industry provides no "special benefit," and certainly not to an "identifiable recipient." Since the Commis-

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[16] As a result of this decision NCTA, on April 27, 1973, filed a Supplement to its Petition for a Writ of Certiorari with this Court. This decision is included as a Supplementary Appendix to Petitioner's Supplement to Petition for Writ of Certiorari, (hereinafter referred to as (Supp. App.).

sion first began regulating some phases of CATV in 1965, the principal thrust of the regulation has been the protection of television broadcasters. This "ancillary" assertion of jurisdiction has been wholly restrictive in nature. A CATV system does not need Commission authority to operate. This permission is granted at the local level for which annual franchise fees are generally paid. The argument that an economic climate is created is clearly insufficient since the public at large benefits rather than an "identifiable recipient" of a "special benefit." This is the crux of the decision of the Court of Appeals for the District of Columbia in *New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425 (D.C. Cir. 1972)[17] overturning an analogous annual fee imposed by the FPC.

Even if some "special benefit" to CATV systems is assumed for the sake of argument, the requirement of an "identifiable recipient" is fatal to the annual fee for two reasons. First, the bulk of CATV systems makes no request or filing with the Commission in the course of a year, and thus a specific, identifiable CATV system receives no "measurable unit" of service such as a license, permit, or certificate. Second, the annual fee is imposed on all CATV systems on the basis of number of subscribers and is therefore completely unrelated to what specific work, if any, was done for a particular CATV system. These are the obvious distinctions from the Commission's principal case authority, *Aeronautical Radio, Inc.* v. *FCC*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965), where the court sustained filing fees imposed on applicants for permits.

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[17] The decision was included as Appendix D to Petitioner's Petition for a Writ of Certiorari (hereinafter referred to as Supp. App. D).

In addition, the Commission has failed to properly consider the factor of "value to the recipient" in setting the annual fee in its overriding effort to recover all of its costs of regulation. The Commission's formula was simple. It involved estimating the direct and indirect cost of regulating CATV, deducting from that estimate the revenues received from filing fees and dividing the remaining costs among the total number of CATV subscribers to reach a 30 cent per subscriber annual fee. Furthermore, the amount paid is determined not by "value" or "special benefit" received from the Commission but upon the number of subscribers and hence upon the CATV system's gross receipts. Therefore, the annual fee, in its present form, is an illegal tax.

ARGUMENT

I. TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT DOES NOT AUTHORIZE THE FEDERAL COMMUNICATIONS COMMISSION'S IMPOSITION OF AN ANNUAL CATV ASSESSMENT WHEN NO SPECIAL BENEFIT TO AN IDENTIFIABLE RECIPIENT HAS BEEN PROVIDED.

A. The Commission's Authority To Assess Fees Is Limited

The Commission's *Report and Order* for the first time, established the payment of fees by CATV systems filing certain requests and notices. NCTA, in its comments to the Commission, did not question the Commission's authority to establish reasonable filing fees.[18] However, the Commission also assessed an annual fee of 30 cents per subscriber on all CATV sys-

[18] The filing fees imposed by the Commission for the processing of the various special relief applications, notifications and petitions may not necessarily relate to the total actual cost associated with the provision of a service to the particular CATV applicant. The comments of the CATV industry did complain at the time of the issuance of the *Notice of Proposed Rulemaking* that it was the first time the Commission had imposed a charge for a request for relief from general restrictive regulations.

tems. The Commission relies on the Independent Offices Appropriations Act of 1952, 65 Stat. 290, 31 U.S.C. § 483a, (hereinafter Appropriations Act) in imposing these annual fees. (A. 151) The Appropriations Act is the sole statutory basis for the Federal Communications Commission's authority to impose fees. The Communications Act of 1934 itself does not authorize the assessment of any Commission fees.[19]

No authority exists in the Appropriations Act for the Commission to exact its annual 30 cent per subscriber fee on all CATV systems.[20] The charging of fees is legitimate only when the following conditions exist: first, the regulatory agency must provide some specific thing of value, *i.e.*, "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility"; and second, this

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[19] In one limited instance, Section 4(f) (3), 47 U.S.C. § 154(f) (3), requires ship owners to pay for certain overtime services by Commission engineers.

[20] The Appropriations Act provides in pertinent part as follows:

"It is the sense of the Congress that any *work, service,* publication, report, document, benefit, privilege, authority, use, franchise, *license,* permit, certificate, registration, *or similar thing of value or utility performed,* furnished, provided, granted, prepared, or issued *by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible* and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the president may prescribe) to prescribe therefor such fee, charge, or price, *if any,* as he shall determine in case none exists, or redetermine in case of any existing one, *to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . .*" (Emphasis added). (A. 151)

"value" must be provided to or for a specific or identifiable person. It cannot be to the public generally. The Commission's annual fee for CATV systems fails to meet either of these conditions. The Commission's clear primary objective in promulgating the new fee schedule is to obtain revenues from CATV systems which would approximate the total amount of its CATV budget requirements. However, total subsidization is not a statutory criterion for establishing a fee schedule. The directive "to the full extent possible" cautions that the Commission is limited by the true criteria established under the statute regardless of any general desire to obtain total subsidization of its CATV activities.[21]

The Appropriations Act provides that agency fees "shall be uniform as practicable and subject to such policies as the President may prescribe." In 1953, following the enactment of the Appropriations Act, the Bureau of the Budget issued its first Circular No. A-25 in an effort to interpret the provisions of the Appropriations Act. After several revisions it was reissued on September 23, 1959, and stands today as the current set of guidelines for the Appropriations Act. (A. 142).

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[21] The legislative history of the Appropriations Act evidences that the Congress did not intend to confer upon federal agencies the power to levy charges on persons who were simply subject to its jurisdiction. The House Appropriations Committee, in reporting the Appropriations Act, stated that the motivation for authorizing federal agency fees resulted from the fact that the government "is not receiving full return from many of the services which it renders to *special* beneficiaries." (Emphasis added). H.R. Rept. 384, Committee on Appropriations, 82nd Cong., 1st Sess. 2 (1951). The Senate imposed the same guidelines. S. Rept. 2120, Committee on Expenditures in the Executive Departments, 81st Cong. 2nd Sess. (1950).

The Bureau of the Budget Circular No. A-25 (hereinafter "Circular") established that the "responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies of this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices." (A. 144).

Thus, the initial steps in the Circular require each agency, in formulating its fees, to identify the covered services or activities and to determine the special benefits provided by the agency. The Commission steadfastly maintains that the annual fee had been prepared in the light of these Executive and Congressional directives. (A.3, 38). Perhaps the Commission should not be expected to identify each of its respective cost for each CATV system which pays the annual fees, but neither the Commission's *Notice of Proposed Rulemaking, Supplemental Notice* nor *Report and Order* identifies which, if any, services or special benefits to particular CATV systems or even to the CATV industry as a whole are rendered in return for the payment of the annual fees. Compliance with that obliga-

tion would seem to be particularly necessary in the case of annual fees where no relationship to any agency service is apparent as might be the case with a filing or grant fee. The agency is required to identify the special benefits since the Circular also emphasizes that "special benefit" or "value" is critical to the assessment of fees by an agency.[22]

At the same time, the Circular states that only regulation providing these special benefits to *identifiable beneficiaries* justifies the imposition of charges (A. 143). This requirement is expressed throughout the

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[22] 3. General Policy: A reasonable charge, as described below, should be made to each identifiable recipient for *a measurable unit or amount of government service or property from which he derives a special benefit.* (Emphasis added).

a. *Special Services:*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a government rendered service:

(a). Enables the beneficiary to obtain more immediate or substantial gains or value (which may or may not be measurable in monetary terms) than these which accrue to the general public (e.g., receiving a patent . . .); or

(b). Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificate of necessity and convenience for air line routes . . .); or

(c). Is performed at the request of the recipient and is above and beyond the services regularly received by the other member of the same industry or group, or of the general public (e.g., receiving a passport, visa or airman's certificate . . .) (A. 143)

Circular in both the "Coverage" and "General Policy" sections.[23]

Thus, the Appropriations Act, as further clarified by the Circular, authorizes the Commission to impose fees only to recover the costs of rendering a service providing value or benefits to identifiable beneficiaries beyond the benefits obtained for such service by the general public. The Commission in levying its annual CATV fee failed to meet these standards.

B. The Commission's Regulation of CATV Provides No Special Benefits to CATV Systems

In *New England Power Company* v. *Federal Power Commission, supra,* the Federal Power Commission assessed flat filing fees and an annual charge against electric power and natural gas pipeline companies under its jurisdiction. The fee schedule called for the FPC to determine the regulatory costs of its programs and then to subtract the revenues raised from the filing fees. (Cert. D-4). The remaining cost was recovered by annual fees levied against each company

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[23] 2. [T]he provisions of this Circular cover all Federal activities which convey special benefits *to recipients alone and beyond those accruing to the public at large.* (emphasis added) (A. 142).

And:

3. A reasonable charge, as described below, should be made to *each identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit. (emphasis added). (A. 143).

And:

3(a)(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products). (A. 143-144).

in proportion to the amount of jurisdictional gas deliveries (or power sold) by the company as a ratio of the total sold by all the jurisdictional companies. (Cert. D-4, 5).

The FPC, in defending its fee schedule, contended that its charges came within the Circular's terms because the charge related to the cost incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and while such regulation "has provided continuing benefits to consumers," it has also:

> redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. (Cert. D-8).

The court in *New England Power Company* completely rejected this argument. It noted that the creation of an "economic climate" is not a special service nor is a particular company the "special beneficiary" of such a climate any more than any other company or the consumer in general.

The Court concluded that the regulation of the gas and power companies was primarily for the benefit of the public and therefore that:

> *There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public.* In the absence of Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. (Emphasis added). (Cert. D-9).

In both *New England Power Co.* and the instant case the special benefits to identifiable recipients are obscure. In fact, unlike the gas pipeline companies who receive a certificate of convenience and necessity as operating authority from the FPC, CATV operators receive such authority at the local level.

Commission regulation of CATV has resulted in little, if any, benefit even to the CATV industry as a whole. There is not even the beneficial "economic climate" found by the court in *New England Power Co.* to be insufficient as the needed statutory benefit. Since the *First Report and Order*, 38 F.C.C. 683 (1965), regulating microwave-fed CATV systems and the *Second Report and Order*, 2 F.C.C. 2d 725 (1966), regulating all CATV systems, the Commission's regulation of CATV has had as its objective the economic protection of the television broadcaster to the economic detriment of the CATV industry.

This Court's decision in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), succinctly describes the Commission's CATV regulation under the *First Report and Order* and *Second Report and Order, supra*:

> First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals. Second, CATV systems were forbidden to duplicate the programming of such local stations . . . (See generally, *First Report and Order*, supra, at 719-730). These carriage and non-duplication rules were expected to "insure many stations ability to maintain themselves as their areas' outlets for highly popular network and other programs" Id., at 715 . . . After futher hearings the Commission held that the act confers adequate regulatory authority over all CATV systems. *Sec-*

ond Report and Order, supra, at 728-734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the non-duplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously found (in evidentiary hearings) that "it would be consistent with the public interest . . . particularly the establishment and healthy maintenance of television broadcast service in the area. Id., at 781-785; 47 C.F.R. § 74.1107(c). Finally the Commission created "summary non-hearing procedures for the disposition of applications for separate or additional relief. 2 F.C.C. 2d at 764; 47 C.F.R. § 74.1109."; *U.S.* v. *Southwestern Cable Co.*, 392 U.S. at 166-67 (1968).

Since *Southwestern* the Commission has continued to regulate CATV as "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting." The Commission, urged by the broadcast industry to impose a "freeze" on all CATV construction, accomplished this result on December 13, 1968, in its *Notice of Inquiry and Proposed Rulemaking* in Docket 18397, 15 F.C.C. 2d 417 (1968). Foregoing its evidentiary hearing process, the Notice immediately imposed a procedure of "retransmission consent."[24] These procedures were in effect for over three and one-half years and for the entire time television stations refused to grant such consent.

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[24] CATV systems, in order to carry more than local television signals, were required to obtain "retransmission consent" directly from the distant television broadcast stations on a program by program basis. *Notice*, 15 F.C.C. 2d at 432.

On July 21, 1971, over two and one-half years after the freeze began, the Chairman of the Commission himself in testimony at Congressional hearings politely characterized the horrendous effect of retransmission consent on the CATV industry:

> After two-and-a-half year's experience we now recognize that cable systems cannot develop on the basis of retransmission consent. Thus, the net effect has been to delay consideration of most proposals for new cable systems. *Statement of Dean Burch, Chairman, before the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce*, p. 11.

The Commission in June 1970, issued its so-called proposed Public Dividend Plan in a *Second Further Notice of Proposed Rulemaking* in Docket 18397A, 24 F.C.C. 2d 580 (1970).[25] The Commission, in part, proposed that CATV systems pay five per cent of gross income to educational television stations and that local UHF stations be permitted to insert their advertising on the television signals imported by CATV systems.

The United States Department of Justice, commenting on the Commission's proposals, put its finger on the essence of the Commission's CATV regulation:

> *The Commission candidly admits that it is searching for "an approach to this distant signal problem which will affirmatively assist the elements of broadcasting most requiring aid-* the independent UHF station and the public broadcasting system (ETV)—and will do so in a way which can be fair to the copyright owner and will not under-

[25] This *Second Notice* was supported in some respects by the CATV industry as a last resort to break the freeze.

> mine the healthy operation of all other stations in these markets. (*Second Notice*, para. 4)."
>
> Two premises pervade the Commission's analysis and proposals with respect to importation of distant signals, not only in this immediate proceeding, but throughout its consideration of CATV problems: The first is that television broadcasters are being subjected to "unfair competition" from CATV operators; and the second is that there is a public interest in preserving marginal television and restrictions aimed at CATV. We submit that both of these are incorrect as a matter of policy. (Emphasis added). Comments at 4.

There has been further criticism by the Justice Department of the Commission's regulation barring to a great extent pay-cable-casting by CATV systems. On May 3, 1971, the Justice Department filed a Memorandum in Support of Petitions for Reconsideration of the Commission's *First Report and Order*, in Docket 18397, 20 F.C.C. 2d 201 (1969). The rationale for the regulatory prohibitions said Justice, "is plainly stated to be protection against loss of over-the-air broadcast programming ("siphoning")." Memorandum at 2.[26]

NCTA recited to the Fifth Circuit the adverse effects of the Commission's CATV regulation, prior to,

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[26] Recognizing the ancillary nature of CATV regulation, the Justice Department argued at length against the Commission's protective policies and concluded:

> To relegate an emerging mode of electronic communication to a role in which it may not develop to the full extent of its economic potential is clearly an important and far-reaching decision. In the absence of a Congressional mandate, therefore, the enforcement of a regulation so restrictive of CATV cablecasting as to handicap its growth and development conflicts, we think, with expressed Congressional policy favoring competition and favoring the full development of the inherent potential of all modes. Memorandum at 11.

during and subsequent to the promulgation of the annual fee schedule at issue. The court in *Clay* noted that but stated that under the Appropriations Act it is not relevant whether the regulated industry likes the regulation, but whether the industry benefitted in a manner different from the public at large. (Cert. A-18)

The Fifth Circuit may be correct that the statute does not require that an industry approve of regulation before fees can be charged. But the court's list of "valuable benefits" that the industry has received misses the point entirely. The regulatory history of CATV regulation has simply not been designed to "benefit" the CATV industry as a whole nor is there any benefit "to or for any person" as required by the Act or to an identifiable recipient as specified by the Circular. *See, New England Power Co., supra.*

The Fifth Circuit concluded that "benefits" flow to the CATV industry as a result of its broadcast regulation. The Court cited the scarcity of television outlets which exists under the Commission's *broadcast* regulations and which creates much of the economic value attached to distant signals imported by CATV.[27] (Cert. A-18)

Any benefit the CATV industry receives from the Commission's regulation of broadcasting is purely derivative and incidental, thus clearly insufficient for imposing fees. This incidental connection is the vital difference between the broadcast regulatory scheme and the CATV regulatory scheme. In addition, broadcasters receive a valuable monopoly from the Commis-

[27] It is important to note that many CATV systems do not even carry distant signals.

sion in the form of a license, without which they cannot go into business. The CATV annual fee cannot be levied on CATV systems under the Appropriations Act on the basis of this tenuous connection.

The Executive guidelines confirm the failing of the Commission's action. None of the Circular's standards of "value" or "special benefit" to an identifiable beneficiary are found in the Commission's regulation of the CATV industry.

Under the criteria established in 1(a) of the Circular, (A. 143), the CATV industry, through Commission regulation, does not obtain "more immediate or substantial gains or value," either monetary or nonmonetary, as a result of Commission jurisdiction. The Commission neither grants a monopoly nor the use of the limited public spectrum to a CATV system. A CATV system is not protected from competition by the Commission as are the broadcasters and telephone common carriers. There is no need for the Commission to grant rights of way, exclusive territory or other benefits. Any rights acquired by the industry are obtained and paid for by franchise fees and other compensation at the municipal or state level.

Under the criteria established in 1(b) of the Circular (A. 143) the Commission's regulation of CATV since its inception has hardly been the kind to provide "business stability" or assure "public confidence" in the business activity of the cable television industry. The Commission's own acknowledged restrictive policies have destroyed the CATV industry's research and development and impaired the industry's progress and stability.

Finally, under the criteria established in 1(c) of the Circular (A. 143) the Commission's initial assump-

tion of jurisdiction was not sought by the CATV industry but was imposed at the request of the television broadcasters. CATV systems pay filing and application fees when requesting specific relief from the regulations. Many existing systems, currently providing full services, have never had to contact the Commission. Their contact will be the periodic filing of burdensome reports for the Commission's benefit.

Nor can the Commission find support for its new annual fee schedule in *Aeronautical Radio, Inc.* v. *Federal Communications Commission*, 335 F. 2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) (A. 41). That case is inapposite. At issue in *Aeronautical Radio* was the Commission's *Report and Order* in Docket 14507 which levied nominal *filing fees* on applications for broadcast stations *licenses*, radio operator *licenses*, and for *certificates* for common carrier operations. Radio and television stations obtained valuable licenses to use public resources from the Commission. Common carriers obtained certificates of public convenience and necessity from the Commission insulating them against competition from other carriers and providing them with a guaranteed rate of return.

The 1963 fee schedule was affirmed on the basis of of the Appropriations Act's specific reference to licenses and certificates. The special benefits here were clear. The imposition by the Commission of the new annual fee schedule on the CATV industry is far more than just adding a new industry to the list of the assessed. It alters the basis of past agency schedules from an application and filing fee system to a system largely based on a levy against gross revenues of all CATV systems. The basis found to be proper for agency fees in *Aeronautical Radio* has been discarded.

Yet the Commission attempts to manipulate the philosophy of *Aeronautical Radio* to support its CATV annual fee. The Commission argues that because CATV is so simliar to other services which, in fact, the Commission authorizes and included in its first fee schedule, it should likewise be included in the new fee schedule, and charged not only filing fees but also an annual fee of substantial magnitude. In continuing this feint the Commission in its *Report and Order* avoids giving any specific indication of the beneficial services provided.

A CATV system is characterized as "the subject of Commission regulation and which, directly or indirectly receives what, in effect, is a *Commission authorization tantamount to a license.*" (Emphasis added) (A.41). The modifiers "directly or indirectly," "in effect" and "tantamount to" in the Commission's own self-serving declaration hint at the tenuous nature of the Commission's conclusion. The Commission's characterization of its CATV regulation as "general authorization to provide this interstate communications service" and its bootstrapping of the CATV fee schedule is an attempt to put a square peg in a round hole. The "authorization" which is described as "tantamount to a license" is designed to restrict CATV systems ' competitive status with the television broadcast industry.[28] The Commission did not license CATV sys-

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[28] Even a licensed entity must receive a "benefit" in connection with the assessment of a fee. The annual fees overturned in *New England Power Co., supra,* were being levied against the licensee natural gas companies. The court still concluded there was the lack of necessary "benefit" related to the annual fee.

tems at the inception of its CATV schedule, nor does it do so today.[29]

An explicit contradiction of the Commission's conception of its CATV regulation for purposes of serving as a basis for its annual fees is found in a dialogue between Senator John Pastore, Chairman of the Senate Subcommittee on Communications, and Commission Chairman Dean Burch during hearings on June 15, 1971:[30]

> Senator Pastore: In other words, before a CATV can become operative, he has to apply in some form to the FCC?
>
> Mr. Burch: Yes. We do not—at the present time we do not issue a license: "The FCC authorizes the Midwest Video Company to do something." What they have done is complied with our rules that are applicable.
>
> Senator Pastore: *Can they not do that without consulting you?*
>
> Mr. Burch: *Yes.*
>
> Senator Pastore: *In other words, you formulate and prescribe but they do not have to bother with you at all?*

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[29] A new set of cable rules was made effective March 31, 1972. Cable Television *Report and Order*, 36 F.C.C. 2d 143 (1972). Under these rules, new CATV systems must obtain a certificate of compliance from the Commission before they can commence operations. But basic operating authority still comes first from the local franchise, and then the Commission looks over the proposed operation solely for consistency with the Commission's rules. In any event, this certification requirement comes two years after the fee schedule took effect and the great majority of existing systems will not have to obtain such a certificate until 1977.

[30] Hearings before the Subcommittee on Communications of the Committee on Commerce, 92nd Congress, 1st Sess. at 87-88 (1971).

Mr. Burch: *They have to pay a fee every year. They have to be on our mailing list, and things of that nature.*

* * *

Senator Pastore: *The broadcaster has to get a license. They (CATV operators) are the people who do not have to do anything but subscribe to a rule; all they have to do is abide by the rules but do not come to you for a license or grant, and yet you want a fee—for doing what?*

Mr. (Commissioner) Johnson: They are only paying 30 cents; they are only getting 30 cents worth.

(Laughter)

Mr. Burch: I will tell you what they are paying for. They are paying for a bureau which has probably grown 20 times. It is now 27 people and it started with about one. That costs a *substantial portion of our budget each year, and there is no way of allocating that to the cable interests other than on a subscriber basis.* (Emphasis added).

Chairman Burch's responses and Senator Pastore's reaction provide a common sense rejection of the Commission's rationale for its annual CATV fee.

CATV systems do not obtain their right to operate from the Commission. Local governments and, in some cases, state governments provide the appropriate permits and franchises which serve as the authorization for CATV services.[31] As long as minimum notice to

[31] Unlike broadcast services and common carrier services, the CATV system in return for the permit to operate in a particular community already pays an annual percentage fee or gross receipts tax to the local community. This annual percentage payment has been increasing rapidly and averages from 3-7% of the CATV system's gross revenues.

television broadcasters was given by the CATV franchise holder,[22] the Commission at the time of the promulgation of its fee schedule could not prevent CATV operation.

In view of the foregoing, the Commission's limited regulation of a CATV system cannot be puffed into regulation "tantamount to a license" or a "general authorization to provide this interstate communications service," which is of special benefit to an identifiable CATV system.

Assuming, *arguendo*, that present Commission regulation of CATV is beneficial to the public at large, such public benefit is not the kind of "value" or "special benefit" to an identifiable recipient necessary for recouping the Commission's total regulatory costs for its CATV regulation via annual fees.[23]

The Fifth Circuit's focus on the Commission's prohibitions designed to restrict ownership of CATV sys-

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[22] Under the Commission's 1970 regulations, a CATV system beginning operation gave notice to each television broadcast station in whose area the system proposed to operate. A copy of such notice was forwarded to the Commission. Unless a broadcaster objected, the system could begin operation. 47 C.F.R. § 74.1105. Section 1.1116 (a) of the Commission's fee schedule which is not at issue here, provides for a fee of ten dollars to be paid with each notification. 47 C.F.R. § 1.1116 (a).

[23] This Court's decisions in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 at 175 (1968), and *United States* v. *Midwest Video Corp.*, 406 U.S. 649 at 659-662 (1972), recognized the Commission's public interest motives through its regulations requiring CATV carriage of local signals, prohibiting duplication of local signals, prohibiting duplication of local programming, restricting the importation of distant signals and mandating origination on certain size CATV systems.

tems by telephone companies,[34] networks and broadcast stations[35] is improper. Such regulations are analogous to the "economic climate" argument put forth by the Federal Power Commission and rejected by the District of Columbia Circuit in *New England Power Co., supra.* (Cert. D-8). It is, in effect, a "competitve climate" argument. Regulations that are designed to keep "entry into the industry open" are not "measurable units of service" as is statutorily required.[36] Under the principle established in *New England Power Co.*, these open entry regulations were clearly enacted to benefit the public, not CATV systems, as identifiable beneficiaries.

The imposition of the Commission's annual CATV fee clearly violates the policy specifically set forth in the Circular which prohibits charging for services "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered benefitting broadly the general public." (A.143-144).

If, as even the Commission admits, the public is the prime beneficiary of the Commission's CATV activities, the public should bear a major portion of the cost of such regulation. The CATV system would continue to share in the burden through payment of the filing, petition and notification fees imposed by the Commission.

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[34] *Report and Order* in Docket 18509, 21 F.C.C. 2d 307 (1970).

[35] *Report and Order* in Docket 18397A, 23 F.C.C. 2d 816 (1970).

[36] The *Clay* decision refers to the Commission's attempts to keep entry to the industry open by regulation designed to prohibit television station ownership of CATV systems in their service area and proposed rules banning newspaper ownership. (Cert. A-17). NCTA did not support the promulgation of either regulation.

C. The Annual CATV Assessment Is Unrelated Both To Providing Any Special Benefit To Any Identifiable CATV system or to the Regulatory Costs Individually Associated With Regulating the System

Even if the Commission's regulation specially benefited some systems in the CATV industry, the annual charge of thirty cents per system subscriber assessed against CATV systems is totally unrelated to any specific service or benefit provided. The classification by the Commission of CATV as an interstate communications facility over which the Commission has *assumed* some jurisdiction is not the related act which justifies the legal imposition of an annual fee.[37] The Commission rationalized in its *Report and Order* that its regulation of CATV requires a major staff unit and that this will constitute recoverable costs (A. 41). Yet the Commission, by "regulating" the CATV industry and thereby incurring costs of regulation cannot automatically pass on that cost in full via the imposition of an annual fee. The Appropriations Act only permits the imposition of fees to make certain agency activities self-sustaining; not automatic fees to make an agency totally self-sustaining.

Under the Commission's approach the CATV annual fees would be levied on a CATV system over which the agency has some jurisdiction even though the system had not filed any request with the Commission or obtained any specific service during the entire year. Typically, most CATV systems paying the annual charge for 1970 never had any specific business before the Commission in that year. And that has continued for each year the fees have been in effect.

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[37] *Report and Order.* (A. 41)

In *Aeronautical Radio, supra,* the fees were limited to the filing of certain types of radio station applications ranging from $2 to $100, *i.e.,* voluntary action of the parties with the fee being directly related to the voluntary act. The Court in *Aeronautical Radio* had no occasion to consider how an annual charge could fulfill the necessary related value or benefit to a specific recipient. Indeed, upon the basis of the record before it, the Court in *Aeronautical Radio* had reason to believe that the Commission was of the opinion that it could not levy such an unrelated annual charge.

In adopting the 1963 schedule of application fees, the Commission stated:

> . . . we firmly believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government *which bestow special privileges and services upon certain individuals who may apply* for those privileges and services. (emphasis added) *Report and Order,* Docket 14507, *supra,* at 1562-63.

Where an application or pleading is involved, the fee is directly related to a voluntary act. Here the additional annual CATV charges, beyond the filing and application fees, arise out of no voluntary action initiated by the charged company. As in *New England Power Co., supra,* a CATV system pays despite the fact that it had no proceedings before the Commission that year. The formula for the annual fee in that case bore the same lack of relationship to specific services rendered or costs incurred in rendering them. In fact, both methods were based on unrelated economic

criteria; for gas and power companies, the amount of gas delivered or power sold; for CATV systems, the number of subscribers.

It is submitted that the lack of a relationship between benefit or services rendered to a particular CATV system or its cost and the annual payment by individual systems goes beyond the Congressional mandate. It is therefore fatal to the Commission's effort to attain total subsidization via the annual fee.

II. THE ANNUAL CATV FEE SCHEDULE EXCEEDS THE COMMISSION'S AUTHORITY SINCE ITS SOLE PURPOSE IS TO RECOVER THE TOTAL APPROPRIATION FOR CATV REGULATION FROM CATV SYSTEMS WITHOUT REGARD FOR THE CRITERIA SET FORTH IN TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT.

A. The Commission Failed to Properly Consider Value to the Recipient in Establishing Its CATV Annual Fee Resulting in an Unreasonable and Arbitrary Schedule of Charges

As has been demonstrated, the directives set forth in the Appropriations Act read in conjunction with the Circular require that for fees to be charged, there must be work, service, benefit, license or similar thing of *value* performed for identifiable recipients. Under the Appropriations Act, fee charges must be fair and equitable taking into consideration value to the identifiable recipient as well as the direct and indirect cost to the Government, public policy or interest, and other pertinent facts. (A. 151)

The statute requires that the agency consider *all* of these criteria. It does not permit the Commission to establish fees by arbitrary redefinition of the criteria, or, in fact, to select just one criterion as the Commission did—the "direct and indirect cost" of the services.

The total maximum fees are governed by the "cost" of the regulation,[38] but the other factors must be used since fair and equitable fees may well total less than the cost of regulation.

NCTA submits that the Commission totally ignored the factor of "value to the recipient" in setting its annual fee schedule and acted arbitrarily and unreasonably without any true concern for the standards established in the Appropriations Act.

The Commission recognized that it was supposed to consider the factor of value in promulgating its new fee schedule when it stated in its *Notice of Proposed Rulemaking* in Docket 18802:

> *Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the "value to the*

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[38] NCTA, in its 1970 comments in Docket 18802, attempted to calculate the Commission's cost of regulation of CATV in fiscal year 1971 and the projected revenue from fees using the Commission's estimated figures. Following its calculations, NCTA demonstrated to the Commission that because it had underestimated CATV subscribers and overstated CATV regulatory costs (based on its budget to the Congress) its gross revenues from CATV fees would exceed its cost of regulation by 40%. The Commission ignored these comments and adopted the fee schedule virtually as proposed. On December 27, 1972, the Commission released a *Notice of Proposed Rulemaking* in Docket 19658 (to increase fees), *supra*. In paragraph 5 of the *Notice* the Commission admitted that it had calculated improperly in establishing the 1970 CATV fees. The Commission states:

> Adoption of a cable fee schedule yielding that percentage (88%) rather than full coverage, reflects the Commission's desire *to offset the unintentional inequities resulting from the cable fee schedule basically adopted in 1970 (and currently in force) under which the Commission's actual cable revenue amounted to approximately 200% of cable-regulation budget allocations* . . . (emphasis added)

> *recipient" of the privileges granted,* as well as the public interest served and the direct and indirect cost to the Government. Therefore, in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, *the new fee schedule adopts the concept of a separate fee reflecting our consideration of the "value to the recipient" factor involved in authorizations and licenses. The latter fees are specifically tied to a factor of value* either established by the recipient or graduated according to the generally recognized *technical* and *economic status* of the *licensed* facility being sought or being authorized. (footnote omitted) (emphasis added) (A. 4)

In its *Memorandum Opinion and Order* of April 16, 1970, 22 F.C.C. 2d 452 (1970), the Commission unwittingly admitted its real rationale while stating its reasons for denying access under the Freedom of Information Act to the documents showing "direct and indirect costs":

> Thus, as explained in the *Supplemental Notice* (released March 4, 1970), the Commission has derived a proposed schedule of fees for CATV systems which in the aggregate would return a sum equal to the aggregate operating costs of the Commission in regulating the systems. *The Commission has further determined that these aggregate costs of CATV regulation would be most equitably distributed among the systems primarily by assessing each system with over 200 subscribers* [exemption later removed in the *Report and Order*] *an annual fee of 30 cents per subscriber. Therefore, the derivation of the proposed schedule of fees for CATV systems follows an uncomplicated logic.* (emphasis added) (A. 33)

While the Commission's reliance on the cost factor alone makes the initial formulation of CATV fees un-

complicated, it also violates the spirit and express provisions of the Appropriations Act and the Circular. The criterion of value to the recipient, or special benefit, is so instilled in the concept of "fair and equitable" fees that it may not be disregarded in favor of a theory which says that a regulated industry can be forced to pay fees equal to or exceeding the cost of its regulation, regardless of specific value or benefit to the members of the industry.

If the Commission has considered "value" as a factor in adopting its CATV fees, NCTA submits that it has done so improperly by confusing earnings or "profitability" of the CATV industry with value.

A clearer clue as to the Commission's misdirection in establishing the CATV annual fees is found in the CATV section of its *Notice:*

> This schedule proposes filing fees in generally small amounts for applications, notifications, and petitions filed in the Cable Television Service. The proposed schedule also includes a separate fee reflecting our consideration of the "value to the recipient" factor attendant upon CATV system operation in accordance with our permissive and restrictive rules and regulations and after the filing of notification under Section 74.1105 of our rules. *Since CATV systems provide an interstate communications service upon payment of a charge directly by subscribers, the profitability of CATV systems (i.e., the "value to the recipient" factor) is most readily reflected in the number of customers or subscribers, who directly pay for the provision of such service.* We, therefore, propose to establish an annual fee for CATV systems computed on the basis of the number of subscribers to the service provided by each CATV system. This will provide an equitable distinction amongst

> the fees paid by different CATV systems in accordance with their size. (emphasis added) (A.13)

At the District Court hearing in NCTA's Freedom of Information litigation, it was Commission counsel who finally clarified the Commission's error in explaining the Commission's lack of information used to determine "value to the recipient" for the CATV industry:

> Now, we can adjust ourselves to say and agree with the plaintiff that the community antenna systems have not been under the jurisdiction of the Commission for very long. *And it is true as plaintiff says and we have averred, that we have no information specifically relating to value to the recipient based on reports or documents which had to be filed with the Commission.*
>
> It was at this juncture that Mr. Paglin [Executive Director] and the Commission could understand, or attempt to understand, what plaintiff wanted and said, *"Look, we don't have any documents.* The thing that we took was information we had gotten from your trade association publications. Those documents seemed to indicate to us that the industry last year made x number of dollars." *In the past we have been able to determine what the value to the recipient of the Commission services is by their gross profit or gross intake. If so, we will assume that the gross intake of the community systems is x dollars and that is an indication to us of the value to the community systems.* (emphasis added) (Pet. App. 7a)

In the Freedom of Information suit in the District Court the Commission had refused to provide the documents or information relating to "value to the recipient" on the grounds that they encompassed vast num-

bers of confidential staff memoranda and, that in any event, they could not be identified and assembled without unreasonable expenditures of Commission manpower. In reversing the decision of the District Court in *National Cable Television Association, Inc.* v. *Federal Communications Commission, supra,* the Court of Appeals held that the Commission could not hide behind empty denials and disclaimers. (Supp. App. 6)

The Court found that the Commission's *Notice of Proposed Rulemaking* in Docket 18802 was inadequate on its face for purposes of determining the factors of "value to the recipient" and "direct and indirect cost" for regulating CATV systems, stating:

> After setting forth this generalized explanation of its approach, however, the Commission failed to supply specifics, either as to the facts from which it had reasoned or as to the mechanical steps it had taken in deriving the final schedule. (footnote omitted)
>
> Without data concerning the Commission's costs, it is not possible to determine the basis upon which the Commission allocated its direct and indirect costs among the regulated industries. Without disclosure of the final amount the Commission intended to recover from each industry, it is not possible to determine what, if any, non-cost adjustments were made and whether the final schedule had any relation to the cost allocation. *And without a definition and qualification of "value to the recipient" it is not possible to determine why and how the Commission might be deviating from a pure system of cost allocation. Thus, the Commission insulated itself from external criticism of its method and rationale, leaving nothing open to challenge except the legality of its result.* (emphasis added) (Footnote omitted) (Supp. App. 5-6)

In determining the impropriety of the Commission's wholesale denial of the requested information on value, the court's decision exposed the Commission's less than good faith efforts to comply with the Freedom of Information Act through a combination of inaction, misleading statements and delay.[39]

Throughout its decision the Court of Appeals expresses a concern that the Commission may not have possessed any true basis on the factor of "value to the recipient" to the CATV industry. The claim by the Commission that the documents requested relating to "value" were unidentifiable was viewed with considerable skepticism.

The Court said:

> Where rulemaking proceedings have taken place, the agency has, by definition, already identified its supporting documents, indeed, it would be a most reasonable practice for the agency to retain the documents as a group or index them for future retrieval. *It would be most difficult to rebut the presumption that the agency would be able to produce the documents at least until the validity of its rule has been finally adjudicated in the courts.* (Footnote omitted) (emphasis added) (Supp. App. 17-18)

And further:

> *In the present case the Commission has refused either to state that it did not make use of a mass of financial documents or to identify them.* In fact, the District Court openly invited the former response from the Commission witnesses, but they repeatedly asserted that there was a documentary basis for the Commission's action, although it had

[39] See footnote 11 of the court's opinion. (Supp. App. 7-8)

not been identified in the notices of rulemaking. (footnote omitted) (emphasis added)

* * *

But there remains a substantial factual issue as to whether the Commission relied on trade publications and confidential reports, rather than vague concepts of the profitability of its regulated industries, in preparing its fee schedule. On remand, the Commission should be required to specify by relevant category and sub-category, which—if any—of these materials it used. (emphasis added) (Supp. App. 18-19)

The resulting opinion of the Court, three years after NCTA's original Freedom of Information request, puts in serious doubt whether the Commission, in fact, had or has any factual basis for assessing value beyond conjecture of some CATV systems' profitability. No adequate discussion of its concept of "value" or special benefit has ever been presented by the Commission.[40]

But even if the Commission, in fact, considered "value to the recipient", the law is clear that it cannot define that standard based solely on gross revenues or profitability of the CATV industry, with the single-minded purpose of collecting every dollar of its CATV regulatory cost.

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[40] The Commission, on July 19, 1973, adopted a *Memorandum Opinion and Order,* (F.C.C. 73-784), which denied possession of any information related to value or benefit of its CATV regulation. This candid admission came in response to NCTA's requests of January 11, 1973 and February 23, 1973 for information following the Commission's release on December 27, 1972 of its *Notice of Proposed Rulemaking* in Docket 19658, proposing to increase the CATV annual fee 33⅓ percent to forty cents per subscriber. *Supra,* para. 7.

B. The Proposed Annual Charges Are a Tax Which Can Only be Levied by Congress

NCTA submits that the Commission's new annual fee schedule taken as a whole is defective as an unconstitutional tax on CATV system gross revenues.[41]

In 1963 when it released its *Report and Order* in Docket 14507, *supra*, adopting its filing fee schedule, the Commission rejected arguments which suggested that use taxes should be imposed or that fees should be based on percentage of profits or revenue:

> A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. *The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.* (footnote omitted)
>
> We feel that the proposed charges fall squarely within the court's interpretations as to what constitute fees. While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, *we believe that an overall reading of*

[41] Congress was careful to make the critical distinction between a "fee" and a "tax". A fee bears a reasonable relationship to the extent and nature of services rendered and the benefits received beyond those received by the public generally. *Hanson* v. *Griffith*, 124 N.Y.S. 2d 473, 204 Misc. 736, *aff'd*, 127 N.Y.S. 2d 819, 283 App. Div. 662 (1953); *Smith* v. *Carbon County*, 90 Utah 560, 63 P. 2d 259, 262 (1936). Statutory and regulatory authority permit the imposition of fees, not taxes.

> *Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.* (emphasis added) *Supra,* at 1559, 1563.

The Commission's fees in 1963 were limited to the filing of applications by a licensee, *i.e.,* voluntary actions of the parties with the fee being directly related to the voluntary act. Now the additional annual charges arise out of no voluntary action initiated by the charged company. The new CATV fee schedule changes the basis from a filing fee system to a system based almost entirely on gross revenues.

Recently, in May 1973, Dean Burch, Chairman of the Commission, responded by letter to inquiries made at the hearings on the agency's 1973-74 fiscal year appropriations request by Senator William Proxmire, Chairman of the Subcommittee on HUD, Space, Science and Veterans.[42]

The first of the three questions asked of the Commission was as follows:

> (1) Is there merit to the idea that broadcasters in return for their exclusive use of a valuable "public property" (a leasehold, in effect, on a portion of the radio spectrum), should be assessed an annual levy on profits substantially in excess of the present F.C.C. fee schedule?

The Commission's response belies its conduct in imposing the CATV annual fee schedule.

---

[42] This subcommittee has jurisdiction over the Commission's appropriations, in the United States Senate.

The Commission responded in part, as follows:

> ASSESSMENT ON BROADCASTERS' PROFITS. It goes without saying, of course, that broadcasters are subject to the same federal, state, and local taxes (on income and property) as all other private entrepreneurs. With respect to some special assessment on after-tax profits, the first problem arises in determining the base-line against which these profits should be measured in order to arrive at a valid approximation of the going rate of return . . . .
>
> Additionally, some 25 per cent of all broadcast stations recorded net losses that year. There simply is no way to state that broadcasters as a class enjoy "X" per cent profits or "Y" per cent profits or, indeed, any profits at all, and rule making in this area would thus be a matter of the greater complexity.
>
> Rule making is in any case the wrong term. *What is involved here, clearly, is a form of taxation—and the F.C.C. has no taxing powers nor should it, in our view, have such powers. This is a matter for Congressional action alone. Should the Congress wish to explore this question further, we would of course be prepared to supply whatever additional data might be required.* (Emphasis added) Senate Hearings Before the Committee on Appropriations on HUD, Space, Science, Veterans and Certain Other Independent Agencies Appropriations, Part 2, 93rd Cong., 1st Sess. 1338-39.

The Commission recognizes that it is for Congress to decide whether the Commission should have authority to levy an annual industry-wide tax based on the industry's revenues in general. But the Congress has not done so. The Congress has not delegated, ex-

pressed or implied, the authority that justifies such an assessment.

The CATV systems' annual fee is determined not by proper benefit or value related to the assessment, but upon the number of subscribers and hence upon the systems' gross receipts. The Commission, in its *Report and Order,* defends the uniformity of its formula on the grounds "that subscription rates tend to cluster at about $5.00 per month or a bit higher." (A. 65)

The Commission's yearly assessment is a $.30 cent tax on the annual revenue from each CATV system subscriber. The Commission uses the base of $5.00 a month and $60.00 a year to determine the tax rates. Thus, such an annual charge, argues the Commission, "appears to constitute in the typical case only one-half of one per cent of CATV gross revenues from subscription fees, if that much" and "that in view of the smallness, alternative formulas . . . are unnecessary."[43]

The Commission's statements in 1963 and before the Senate Appropriations Committee this year recognize the characteristics of the CATV annual fee as a tax. Yet the goal of total subsidization of the cost of its regulation has overshadowed all legal principles in the promulgation of the annual CATV fee schedule.

---

[43] A small CATV system of 2,000 subscribers, apart from any application fees, would pay $600 per year in annual fees. Larger systems operating in the top 100 markets on local signals like San Diego or New York City already are paying upwards of $20,000 in annual assessments. These are hardly minimal fees. As the Commission's per subscriber fees increase, as the Commission has proposed, and as city systems mature, annual fees of over $100,000 will not be unusual.

Applying the standards of the Appropriations Act to the Commission's annual fee CATV schedule, it is readily apparent that the assessment in both form and substance is an illegal tax.

CONCLUSION

For the foregoing reasons, the National Cable Television Association, Inc. requests that this Court reverse the decision of the Court of Appeals for the Fifth Circuit as to the Federal Communications Commission's authority to levy an annual fee on the CATV industry in its 1970 *Report and Order* in Docket 18802.

Respectfully submitted,

STUART F. FELDSTEIN
CHARLES S. WALSH
STEPHEN A. GOLD
918 16th Street, N.W.
Washington, D.C. 20006
Attorneys for National Cable Television Association, Inc.

APPENDIX

APPENDIX

APPENDIX A

NATIONAL CABLE TELEVISION ASSOCIATION
918 16th St., N. W.
Washington, D. C. 20005
March 2, 1970

Mr. Max D. Paglin
Executive Director
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Dear Mr. Paglin:

Pursuant to Section 0.461(a) of the Commission's Rules and Regulations, the National Cable Television Association, Inc. (NCTA) requests the right to inspect the annual and inventory reports of all user charges of the Commission submitted to the Bureau of the Budget on Standard Form No. 4 on or about September 30, 1969. In addition NCTA requests the right to inspect documents of the Commission which were used to prepare the Standard Form No. 4 report.

NCTA also requests the right to inspect the Commission's budgetary request for fiscal year 1971, beginning, July 1, 1970, which was submitted to the current session of Congress, including supportive documents used to arrive at the figures included in this request. NCTA further requests the right to inspect the Commission's budgetary requests for fiscal years 1970, beginning July 1, 1969, and 1969, beginning July 1, 1968.

NCTA also requests the right to inspect documents used by the Commission in determining the proposed fee schedules set forth in the Notice of Proposed Rule Making, Docket 18802, released February 19, 1970. In particular, NCTA requests the right to inspect the documents and the listings or records used to determine the "'value to the recipient' of the privileges granted" and "the direct

and indirect cost to the Government" of granting and administering those privileges as referred to in paragraph 5 of the Notice of Proposed Rule Making, Docket 18802.

The right to inspect these materials is granted under the Public Information Act of 1966 as amended, 5 U.S.C. Section 552, which provides that:

> (a)(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person.
>
> (c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

The materials for which NCTA has requested inspection rights do not fall within any of the categories of materials exempt from inspection outlined by Subsection (c) of the Public Information Act of 1966, as amended, 5 U.S.C. Section 522, and by Section 0.457 of the Commission's Rules and Regulations. Because the Commission is not required to withhold these items from public inspection, the Commission has authority to make these requested items available pursuant to Sections 0.451(b)(3) and 0.465 of the Commission's Rules and Regulations.

NCTA is interested in inspecting the above-mentioned items. NCTA is the only national trade association of the cable television (CATV) industry. As such, it represents a substantial number of CATV system operations in the United States and has appeared in many Commission

proceedings affecting the CATV industry, and intends to Comment in the Commission's Docket 18802.

On February 19, 1970, the Commission released a Notice of Proposed Rule Making, Docket 18802, regarding a proposed fee schedule which includes fees to be exacted from CATV system operators who have heretofore not been subject to fees for Commission regulation. In this Notice the Commission stated that the imposition of fees is made pursuant to Executive and Congressional directives that the fees is made pursuant to Executive and Congressional directives that the fee structure fully support the Commission's activities. The Commission further stated that "the schedule being proposed herein reflects estimated fee revenues which generally approximate our budgetary request for fiscal year 1971, beginning July 1, 1970." (Notice of Proposed Rule Making, Docket 18802, par. 4) This proposed fee schedule allegedly is based upon "the direct and indirect cost to the Government" of the work and services performed by the Commission and upon the "value to the recipient of the privileges granted" by the Commission. (Supra, par. 5).

Comments by parties interested in this rule making proceeding must be submitted to the Commission by April 20, 1970. In order to prepare fully informed, relevant and timely comments in this proceeding, it is imperative that NCTA be able to inspect the Commission records directly related to the Commission's cost in granting and administering privileges and the Commission's basis for determining the value of the privileges granted. This relevant information is contained in the documents for which NCTA has requested the right of inspection. NCTA is prepared to pay any of the costs involved pursuant to Sections 0.465 and 0.466 of the Commission's Rules and Regulations.

In conclusion, NCTA requests the right to inspect the annual and inventory reports submitted to the Bureau of the Budget on Standard Form No. 4 on or about September

30, 1969, the supportive documents used in preparing Standard Form No. 4, the Commission's budgetary request to the current session of Congress for fiscal year 1971, commencing July 1, 1970, the Commission's budgetary requests to Congress for fiscal years 1970, commencing July 1, 1969, and 1969, commencing July 1, 1968, and the documents pertaining to the value of privileges granted by the Commission and the direct and indirect costs to the Commission of granting and administering such privileges which are the basis for the fee schedule proposed in Docket 18802.

Very truly yours,

/s/ GARY L. CHRISTENSEN

/sa

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In Reply Refer To:
3400

National Cable Television Association
918 16th Street, N. W.
Washington, D. C. 20006

Attention: Gary L. Christensen, Esquire
General Counsel

Gentlemen:

This is in reply to your March 2, 1970, letter requesting permission under 47 CFR 0.461(a) to inspect the Commission records referred to below. The stated purpose of the request is to obtain information useful in preparing your comments on the Commission's Notice of Proposed Rule Making, in Docket 18802 (released February 19, 1970), which proposes to alter the Commission's schedule of fees.

Your letter initially requests the right to inspect the annual and the inventory reports of all user charges of the Commission submitted to the Bureau of the Budget on Standard Form No. 4 on or about September 30, 1969. The annual report was prepared solely at the direction of the Bureau of the Budget CircularA-25-Supplement 1. This interagency report is regarded as the property of the Bureau of the Budget, and your request would more appropriately be directly to the Bureau of the Budget itself. See 47 CFR 0.451(b)(3). In light of the foregoing, it would be improper to grant your secondary request to inspect the Commission staff's working papers in support of the annual report. On the other hand, the inventory of user charges is nothing more than a schedule of fees, and the Commission's schedule is set forth in Part 1, Subpart G, of the Rules, 47 CFR 1.1101 *et seq.*

Your letter further requests the right to inspect the Commission's budgetary requests for the fiscal years 1969, 1970, and 1971. These budgetary requests were prepared at the direction of the Bureau of the Budget, and what has been said above concerning annual reports of user charges is equally applicable here. However, as you may not be aware, budgetary information for fiscal years 1969, 1970, and 1971, is contained in *Budget of the United States Government—1971,* which is available to you from the Superintendent of Documents.

Finally, your letter requests the right to inspect the documents used in determining "the direct and indirect cost to the Government" and the " 'value to the recipient' of the privileges granted" as set forth in the Notice in Docket 18802. With respect to "the direct and indirect cost to the Government," we note that your letter was submitted before the March 4, 1970, release of the Commission's *Supplemental Notice* (FCC 70-239). Since the *Supplemental Notice* contains information as to the costs of the Commission's various activities, a copy thereof is enclosed herewith. With respect to the " 'value to the recipient'

of the privileges granted," the Commission and its staff relied upon their knowledge of the financial aspects of the communications industry acquired over the years from vast numbers of confidential financial statements, confidential staff memoranda, and various trade publications. Consequently, your blanket request to inspect all of this information must be denied because it cannot be identified and assembled without totally unreasonable expenditures of Commission manpower.

Sincerely yours,

/s/ MAX D. PAGLIN
Executive Director

Enclosure

APPENDIX C

Pages D1-D3 of this appendix (taken from pages 7-9 of hearing transcript) sets forth the argument by Commission counsel, Mr. Robert Werdig, Jr., in support of the Commission's motion to dismiss or for summary judgment before the United States District Court for the District of Columbia on June 11, 1970, in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, C.A. No. 1331-70.

7 to each service it performed.

We submit, therefore, that the plaintiffs do have the information that they requested relative to direct and indirect costs.

Furthermore, it is plain to see that the figures set out in the supplemental notice are no more than a breakdown by service of the Commission's current budget request. The underlying information, should such be needed, must be included in the prior documents we have discussed.

We therefore, submit that Item 7(b) has been provided, which leaves us with (7)(a), to wit, the documents, listings or records used to determine the value to the recipient.

The plaintiff contends that the Commission has switched its position since plaintiff originally asked for these documents. The Commission would tender to the Court the proposition that in the original letter of request of March the 2nd, it was reasonable to assume—inasmuch as there was no specificity in the request—that what plaintiff wanted was the records which the Commission had used to determine value to the recipient of every service provided, broadcast, community, common services, emergency services, everything. It was later, as we see in the affidavit of Mr. Christensen and in the petition for review filed by the plaintiff with the Commission, that they weren't really interested in value to the recipient

8 of every segment of the communication's industry but were only interested in how the Commission arrived at value to the recipient of the community antenna industry.

Now, we can adjust ourselves to say and agree with the plaintiff that the community antenna systems have not been under the jurisdiction of the Commission for very long. And it is true, as plaintiff says and as we have averred, that we have no information specifically relating to value to a recipient based on reports or documents which had to be filed with the Commission.

It was at this juncture that Mr. Paglin and the Commission could understand or attempt to understand what plaintiff wanted and said, "Look, we don't have any documents. The thing that we took was information we had gotten from your trade associations publications. Those documents seemed to indicate to us that the industry last year made x number of dollars. In the past we have been able to determine what the value to the recipient of Commission services is by their gross profit or their gross intake. If so, we will assume that the gross intake of the community systems is X dollars, and that is an indication to us of the value to the community systems."

As Your Honor well knows—

THE COURT: Excuse me. Where do they get the X dollars, from trade publications?

MR. WERDIG: Yes, Your Honor. That's the only place.

9 available. They don't have any information submitted to them except—and I believe we admitted in our motion—that there have been some documents submitted in various hearings before the Commission in which information has been provided about the operations of the community and some systems.

THE COURT: Are those available to the plaintiff?

MR. WERDIG: They made them up; they must be.

THE COURT: These are not documents complied by the Commission?

MR. WERDIG: No, Your Honor. They were documents that were submitted to the Commission.

THE COURT: They were complied by people attending a hearing befored the Commission?

MR. WERDIG: Correct.

We further want to explain to the Court that when Mr. Paglin made the statement in his letter to the plaintiff regarding the vast materials, confidential memorandum, inter-agency notes and things, this was a prepositional phrase which modified the words "knowledge acquired over the years."

Mr. Paglin told the plaintiff that when the staff devised its proposed schedule, it arrived at its proposed rate based upon its knowledge which it had acquired over the years in the communication industries from these various documents which do not particularly relate to the plaintiff because there are no documents in the Commission's control that have been

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITIONS FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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APPENDIX

F.C.C. 70-188

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 18802

In the Matter of
AMENDMENT OF SUBPART G OF PART 1 OF THE COMMISSION'S RULES RELATING TO THE SCHEDULE OF FEES

Notice of Proposed Rulemaking

(Adopted February 18, 1970)

BY THE COMMISSION:

1. Notice is hereby given of proposed rulemaking in the above-mentioned matter.

2. The Commission first adopted rules providing for a schedule of application filing fees in 1963 (docket No. 14507, F.C.C. 63-414, 28 Fed. Reg. 4658; F.C.C. 63-856, 28 Fed. Reg. 10911) and the initial fee schedule, became effective on March 17, 1964.[1] In adopting that fee schedule, the Commission stated that it would undertake a continuing review of the schedule—this continuing review has since been carried forward on a regular basis and a number of changes and modifications have since been made in the orig-

[1] A petition for review of the Commission's action was filed with the U.S. Court of Appeals for the Seventh Circuit and in an opinion of July 10, 1964, that court affirmed both the validity of the Commission's action and the reasonableness of the fees adopted (*Aeronautical Radio, Inc. et al* v. *United States and FCC*, 335 F. 2d 304). On Jan. 18, 1965, the U.S. Supreme Court denied a petition for certiorari seeking review of that action of the Seventh Circuit, 379 U.S. 966.

inal schedule.[2] The present proceeding is a reflection of the Commission's most recent review of this subject matter.

3. In the current review and its attendant changes we have fully considered the thrust of the legislation which vested authority in the Commission to establish the original schedule. The pertinent provision which is included in title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483(a)) and is applicable to all Federal agencies, reads as follows:

It is the sense of the Congress that *any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency* (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, *shall be self-sustaining to the full extent possible and the head of each Federal agency is authorized by regulation* (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the president may prescribe) *to prescribe therefor such fee, charge, or price, if any, as he shall determine,* in case none exists, or redetermine in case of an existing one, *to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts,* and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price,

[2] The current schedule of fees is contained in subpart G, part 1 of the Commission's rules and regulations, sec. 1.1101 et seq.

but this provision shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. (Italic added.)

4. The fee schedule initially adopted in 1964 established nominal filing fees and produced fee revenues which approximated 25 percent of the Commission's annual appropriation at that time and subsequent changes in the fee schedule have generally maintained the same ratio between fee revenues and our annual appropriations. However, after judicial affirmation of the Commission's authority to establish a schedule of fees, the Bureau of the Budget has regularly urged the establishment of higher fee schedules and many other agencies have taken steps to adopt fee schedules calling for higher fees. More recently, the House Appropriations Subcommittee expressed its concern about the Commission's fee schedule and stated that—

The committee also feels that fee charges should be further reviewed and adjusted upward with the objective of assuring that the activities of the Commission are more nearly self-sustaining. The committee will except a report on these items during the budget hearings for 1971.[3]

Thereafter, the conference committee on the Independent Office Appropriations Bill, 1970, supported the views stated above, stating with respect to our fee schedule, that—

> The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.[4]

The fee schedule proposed herein has been prepared in the light of these executive and congressional directives. Additionally, since the Commission's authority to establish

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[3] H.R. 91-316, June 19, 1969, pp. 7 and 8.

[4] H.R. 91-649, Nov. 18, 1969, p. 6.

fees is in terms of the statutory objective to be "self-sustaining to the full extent possible," the schedule being proposed herein reflects estimated fee revenues which generally approximate our budgetary request for fiscal year 1971, beginning July 1, 1970.

5. The fee schedule being proposed herein represents a departure from the existing schedule in several major respects. The present schedule is limited to nominal fees upon the filing of applications for various types of authorizations for radio stations, operators' licenses, and communication common carriers. The approach in the newly proposed fee schedule, in addition to imposing fees in various areas where none exist, is more closely and literally tied to the criteria stated in the above-cited "Appropriations Act." Thus, the proposed fees are designed to make the Commission " * * * self-sustaining to the full extent possible * * * " in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees,[5] to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government. Therefore, in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, the new fee schedule adopts the concept of a separate fee reflecting our consideration of the "value to the recipient" factor involved in authorizations and licenses.[6] The latter fees are specifically tied to a factor of value either established by the recip-

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[5] The bases for the varying license and authorization fees pertaining to the different communication services regulated by the Commission are explained below in the specific sections of this notice dealing with each area.

[6] A principal exception to this concept has been made in the safety and special radio services, as explained in more detail below.

ient or graduated according to the generally recognized technical and economic status of the licensed facility being sought or being authorized.

6. As indicated above, the proposed fee schedule imposes fees in two additional areas which are not now subject to fees of any kind, but are the subject of Commission regulation and which directly or indirectly receive what in effect is a Commission authorization tantamount to a licensee. The first area concerns Community Antenna Television systems which, as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations adopted during the past 5 years. The Commission's authority to regulate the conduct of CATV activities under various permissive and retrictive regulations was affirmed by the U. S. Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Its regulation of this type of interstate communication service now constitutes a substantial portion of the Commission's responsibilities and a major staff unit has now been given permanent status to deal with this area. While the Commission's regulatory approach does not require a prior approval by the Commission in the form of a license before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations. There, therefore, appears to be no reason for distinguishing this service from other communication services which the Commission authorizes and which are now encompassed in the present fee schedule.

7. The second additional area of Commission regulation and authorization reflected in the proposed revised fee schedule is in the field of radio frequency equipment testing and approval. The Commission long ago established

technical standards for various kinds of radio frequency equipment which could be used under Commission authorization. While these restrictions were imposed upon the users of radio frequency equipment, the Commission permitted equipment manufacturers to avail themselves of its testing, review and approval procedures.[7] Having obtained Commission approval in advance, radio equipment manufacturers were thereby enabled to assure prospective purchasers that the equipment was in compliance with the Commission's technical standards applicable[8] to such radio equipment. Subsequently, the enactment of section 302 of the Communications Act established a prohibition against the importation, shipment or sale of radio frequency devices which did not comply with Commission regulations in this area. There is now outstanding a rulemaking proceeding which would require type approval, type acceptance or certification of such devices prior to their importation, shipment or sale.[9] Thus, in effect, the equipment approval actions of the Commission will be tantamount to an authorization which must be obtained prior to importation, shipment or sale of radio frequency devices. The Commission's activities in this area are not insubstantial and currently average some 1,800 type approval, type acceptance and certifications annually. The proposed schedule, therefore, includes an appropriate schedule of fees for these various kinds of radio frequency equipment approval actions.

8. Some further observations of a general nature may be in order as to the considerations taken into account by the Commission in establishing the separate license or author-

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[7] "Type Approval" procedures involve equipment testing by the Commission's laboratory. "Type Acceptance" and "Certification" procedures involve testing by the equipment manufacturer and analysis of test measuurements by Commission engineers.

[8] 47 U.S.C. 8302.

[9] Docket No. 18426 34 F.R. 1057.

ization fees included in the proposed schedule. These have been established in light of the differing factors which are unique to one or another of the many communication services under the broad aegis of the Commission. For example, licenses in the broadcast services are by statute limited to a maximum of 3 years, while the grant of certificates of public convenience and necessity for common carrier communication services under section 214 of the act are without such time limitations. The latter situation also applies to equipment approval actions and our authorization, by rule, of CATV system operations. Similarly the "value to the recipient" factor needs be considered on a different basis amongst various services by reason of their different characteristics and operations. Broadcast services are commercial enterprises which exist on an advertiser-supported basis, without direct charge to the listening public, while common carrier communication companies provide their services to all users at prices set forth in tariffs. On the other hand, CATV systems operate on a somewhat similar basis as common carriers but their provision of but one kind of service to each subscriber at the same price permits a different approach in considering "value to the recipient" than is possible with communications common carriers which utilize the same facilities for the provision of different services to different customers. Again, since our equipment approval actions are taken with respect to many different types of equipment which are sold at different prices, and since such actions attach to all similar units of such equipment which are produced in varying quantities by different manufacturers, consideration of the "value to recipient" factor calls for still another approach. We have therefore selected different bases for considering "value to the recipient," both for different types of actions within each service and similar types of action among different services, which we believe are fair and equitable. We fully recognize that the factors we have used may not wholly or precisely reflect "value to the recipient." But

such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our proposed fees, in total, fall far short of the total value of Commission licenses, grants, and authorizations computed by any standard. Revenues of our broadcast licensees in 1968 approximated $3.5 billion. Revenues from our authorized common carrier communication services in 1968 came close to $16 billion. In the same year, CATV system revenues approximated $220 million and in 1968, total sales of communications equipment under our equipment approval actions exceeded $3 billion. Obviously, these figures are the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations to the persons and companies receiving them. Nonetheless, they do serve to place in perspective the very limited extent to which the Commission has considered the "value to the recipient" factor in proposing a fee schedule which would produce estimated fee revenues approximating $24,900,000—the amount of our budget request for fiscal year 1971.

9. *Broadcast services.*—As stated above, annual revenues of broadcast services provided under Commission license approximately $2.5 billion per year. The broadcast services producing this revenue vary not only in type of service, such as VHF-TV, UHF-TV, AM and FM radio, but also in competitive market situation and, in radio, according to hours of operation and power authorized. Under these circumstances, it is our view that neither a uniform fee nor even a uniform basis for establishing fees would be fair and equitable for all the different types of licenses granted by the Commission. The proposed fee schedule for the broadcast services generally continues the present filing fee concept reflected in the present schedule but, in many instances, on a substantially higher basis. New distinctions are drawn in proposing these filing fees on the basis of market location, type of service, permissible hours of op-

eration, and authorized power. Additionally, new filing fees are set forth for applications for construction permits, short form (pro forma) transfers, applications for assignment of license or transfer of control, applications for subscription TV authorization, and other miscellaneous applications.

The proposed schedule also sets forth separate fees for the grant of construction permits and the approval of assignments of licenses or transfer of control of existing licensees, and also an annual fee for all stations operating under Commission authorization. These separate license fees reflect Commission consideration of the "value to the recipient" factor but on varying bases in terms of the circumstances involved. A flat fee is set forth in the proposed schedule for the grant of construction permits for new stations or for major changes in existing stations which is graduated in accordance with the same categories set forth for the related application filing fees—i.e., type of service, market location, hours of operation, and authorized power.

With respect to the separate fee for grant of assignment of license or transfer of control, differing circumstances make more feasible the establishment of a fee reflecting "value to the recipient" on another basis. Unlike construction permits, which often involve competitive applications and comparative hearings and which simply authorize a new station of undetermined profitability, assignments of license and transfers of control are insulated from competition and concern a going business whose profitability is reflected in a judgment by the parties who have reached agreement on the price to be paid. Transfer fees in other areas such as sale of land and securities have long been based on the purchase price involved, and the Commission proposes to establish a fee in connection with its approval of such assignments and transfers amounting to 2 percent of the total consideration specified in the purchase-sale contracts which are submitted to the Commission as part of the assignment-transfer application.

The profitability of broadcast station operation under Commission license varies greatly not only in terms of type of service, market location, hours of operation and authorized power, but also in terms of competition and varying degrees of sound business judgment and practices. Thus, profitability by itself does not adequately serve as a measure of "value to the recipient" and the use of such a standard would further require the prescription of uniform accounting practices. However, as stated above, the broadcasting industry is advertiser-supported and its revenues derive not from direct charges to the listening public but from advertising rates which are determined by each licensee. Each broadcast station establishes a station rate card which is generally public and published. Our study indicates that the most feasible standard which would reflect the station's relative competitive position in the market is its rate card for the broadcast of commercials. We recognize that such rates vary greatly amongst the same type of station in the same market and in different markets, and that further variation exists between television stations and radio stations. It is our view, however, that these wide variations support the validity of this standard as an appropriate measure of "value to the recipient" of the Commission licenses, which takes into account the wide range of profitability of our broadcast licensees and which is fair and equitable.

In the interest of establishing a simplified fee mechanism for operating broadcast stations, the Commission therefore proposes to establish an annual fee payable by all operating broadcast stations and based upon the licensee's own determination of its rates for commercial spots as described herein. While the Commission invites comments and suggestions on these and other matters, our proposal envisages a requirement for the annual filing with the Commission of station rate cards and, on an annual basis, on a specific date, or on the anniversary date of its renewal, the station would remit to the Commission its annual fee

computed on the basis of its rate card. The proposed fee schedule would establish this annual fee for television broadcast stations in an amount equal to 12 times its highest rate for a one-time 30-second spot for the broadcast of commercials, but not less than $144 and for radio broadcast stations in an amount equal to 24 times its highest rate for a one-time 1-minute spot for the broadcast of commercials, but not less than $52.

10. *Common carrier services.*—The varying nature of the authorizations granted by the Commission in the common carrier services, the differences in the facilities constructed and placed in operation in accordance with such authorizations, and the widely differing kinds of communication services provided by communication common carriers make difficult any generalized consideration of the "value to the recipient" factor in establishing a fee schedule for these services. As stated above, the proposed fee schedule does include the continuation of application filing fees and further establishes a separate fee for the grant of such authorizations. It must, however, be recognized that unique complexities exist in the common carrier services, e.g., the fact that section 214 certificates of public convenience and necessity have no fixed expiration date, while the authorization of radio facilities in the common carrier services is limited by statute to a period not in excess of 5 years; and the fact that the same physical facilities may be used for the provision of different types of common carrier services, etc. We are, therefore, of the view that due and equitable consideration of the "value to the recipient" factor may be given in those situations where appropriate by basing the fee on construction or annual lease costs of the communications facilities encompassed by the particular authorization. Under this approach, which is somewhat similar to the basis used to establish fees for the Federal authorization of interstate natural gas facilities,[10] the application

[10] 18 C.F.R. pt. 159. Fees for hydroelectric projects are generally based on such factors as power generation. 18 C.F.R. pt. 11.

or licensee would pay a fee of 2 percent of the construction or annual lease costs of the facilities covered by the authorization. This figure is initially estimated by the applicant and set forth in its application; where construction is involved, upon completion thereof, the licensee would determine final constructions costs and pay such additional fees (or request a refund), on the basis of such adjusted costs. In other common carrier radio services where construction of the physical facilities covered by the authorization do not afford a proper basis for determination of fees, a flat license fee is set forth as reflected in the attached schedule.

11. *Safety and special radio services.*—As indicated above, the tremendous number of applications filed in the safety and special radio services, in excess of 562,000 annually, together with the minimal percentage of denials of such applications filed in the safety and special radio services, in excess of 562,000 annually, together with the minimal percentage of denials of such applications, militates against the establishment of the tremendous paperwork involved. However, in proposing increases in the single fee for both application filing and license, the Commission has taken into consideration "value to the recipient" and personal benefit to the licensee.

Further, we would continue to exempt from the fee requirement applications and and licenses in such services as police, fire, local government, disaster communications, closed-circuit educational television and separate emergency radio services such as hospitals, disaster relief, nonprofit ambulances and rescue organizations, etc. It should be noted that the proposed schdule no longer separately lists citizens radio license applications or (except in the amateur service), applications for renewal of licenses generally. Certain types of license applications are specifically listed in the proposed schedule with the accompanying fee and all others not specifically listed would be included in the category of "applications for all authorizations except as noted below."

12. *CATV services.*—We have set forth in paragraph 6, above, our basis for including CATV systems in the proposed fee schedule. This schedule proposes filing fees in generally small amounts for applications, notifications, and petitions filed in the Cable Television Service. The proposed schedule also includes a separate fee reflecting our consideration of the "value to the recipient" factor attendant upon CATV system operation in accordance with our permissive and restrictive rules and regulations and after the filing of notification under section 74.1105 of our rules. Since CATV systems provide an interstate communication service upon payment of a charge directly by subscribers, the profitability of CATV systems (i.e., the "value to the recipient" factor) is most readily reflected in the number of customers or subscribers who directly pay for the provision of such service. We, therefore, propose to establish an annual fee for CATV systems computed on the basis of the number of subscribers to the service provided by each CATV system. This will provide an equitable distinction amongst the fees paid by different CATV systems in accordance with their size. It is further proposed to exempt from the payment of such fees the very small systems whose profitability is either marginal or very small. Presently available statistics reflect total CATV subscribers to approximate 3,500,000 to 3,750,000. Of these, less than 1.6-percent receive their service from systems which have 200 subscribers or less. We are, therefore, exempting such systems from the fee schedule which proposes an annual fee of 30 cents for each subscriber. The Commission recognizes that in this, as well as in other areas reflected in the proposed fee schedule, certain changes in substantive and procedural regulations may be required in order to perfect the mechanism by which the amount of fees payable in unusual circumstances and the time and method of payment may be determined. However, the statements made herein together with the proposed schedule attached hereto will fully set forth the scope and thrust of the Commission's proposals.

13. *Equipment testing and approval.*—The wide range of radio frequency equipment which is the subject of our equipment approval actions, in terms of different types, manufacturer's selling prices and number of units which are covered by our approval action, calls for still another approach to the consideration of "value to the recipient" in establishing a schedule of fees in this area on an equitable basis. These radio frequency devices range from citizens band equipment to complicated radar systems and their selling prices from $3.98 to many thousands of dollars. They include electronic equipment tailored to unique needs and produced in small quantities as well as television receivers which are mass produced in the amount of some 10 million sets annually. It is our view that a proper approach to "value to the recipient" should include consideration of all these aspects and that the fee schedule also reflect differing Commission costs for these actions. The proposed schedule, therefore, sets forth application filing fees which vary in amount depending on whether type approval, type acceptance or certification is involved. Such applications would include pertinent information concerning manufacturer's selling prices and estimated production of units of equipment covered by the application. Upon authorization of such equipment, by Commission grant of type approval, type acceptance or certification, the recipient would be required to pay a fee based upon a minimal percentage of the manufacturer's selling price of the equipment multiplied by the number of units to be covered by such authorization. Adjustments in the required fee may be made at the end of each year in the light of actual manufacturer's selling prices and actual production of such unit. We recognize that certain changes may be required either in this proposed regulation or in existing regulations governing the Commission's equipment approval actions in order to conform our requirements with the demands of the proposed fee schedule. This may include revisions designed to guard against the possible disclosure, via payment of fees, of

information which is properly determined to be trade secrets or of a confidential character. The Commission, would, of course, welcome any comments or suggestions on this as well as other aspects of the proposed fee schedule.

14. *Radio operators licenses.*—The present fee schedule relating to commercial radio operators encompasses one fee to cover both the application to take radio operator examinations and the subsequent issuance of a license. The proposed schedule makes no change in this approach. While new fees are proposed for applications for verification cards and posting statements, no increases in existing fees are proposed except for the issuance of restricted radiotelephone permits. This is based on the fact that commercial radio operator licenses are normally issued for a period of 5 years, while restricted radio-telephone permits are valid for the lifetime of the holder.

15. The present fee schedule in section 1.1105(c) provides that no fee is required for applications for "Special Temporary Authorization" (STA) and for waiver. Applications for STA and waiver which are filed with the Commission relate to all of the services encompassed in the proposed fee schedule and some 15,000 are filed with the Commission annually. A number of such applications look to the grant of a special authorization representing a marked departure from our rules and regulations because of unusual circumstances and situations. However, many others look simply to temporary operation of short duration or to minor departures from our rules and regulations. One illustration of the former type is now encompassed in the proposed schedule for CATV systems. We are considering inclusion in the fee schedule of similar types of applications for STA and waivers which look to dispensation and authorization of an important character and which entail special efforts on the part of the Commission in processing them.

16. Authority for the adoption of the amendments herein proposed is contained in section 4(i) (47 U.S.C. 154(i)) of the Communications Act, Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483(a)), and Budget Bureau Circular A-25 and supplements thereto.

17. Pursuant to applicable procedures set forth in section 1.415 of the Commission's rules, interested persons may file comments on or before April 20, 1970, and reply comments on or before May 11, 1970. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision on the rules of general applicability which are proposed herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this notice. No extensions of time will be granted for filing either comments or reply comments.

18. In accordance with the provisions of section 1.419 of the Commission's rules and regulations, an original and 14 copies of all comments, briefs, or comments shall be furnished the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Sections 1.1111, 1.1113, 1.1115, and 1.1117 are amended and new sections 1.1116 and 1.1120 are added to read as follows:

§ 1.1111. Schedule of fees for Radio Broadcast Services.

(*a*) Except as provided in paragraph (*b*) of this section, the fees prescribed below are applicable to applications and operations in the Radio Broadcast Services:

Construction Permits

Application for construction permit for new station or for major changes in existing station:

	Filing fee	Grant fee
VHF top 50 markets	$5,000	$45,000
UHF top 50 markets	2,500	22,500
VHF next 50 markets	2,000	18,000
UHF next 50 markets	1,000	9,000
VHF balance	1,000	9,000
UHF balance	500	4,500
FM class A	100	900
FM classes B and C	200	1,800
AM day, 50 kw	500	4,500
AM day, 25 kw	400	3,600
AM day, 10 kw	300	2,700
AM day, 5 kw	200	1,800
AM day, 1 kw	100	900
AM day, 500 kw	50	450
AM day, 250 w [1]	25	225
AM unlimited, 50 kw	1,000	9,000
AM unlimited, 25 kw	800	7,200
AM unlimited, 10 kw	600	5,400
AM unlimited, 5 kw	400	3,600
AM unlimited, 1 kw	200	1,800
AM unlimited, 500 w	100	900
AM unlimited, 250 w [1]	50	450
AM class IV	100	900
For directional antenna in addition to the above	50	450

[1] The fee for major changes in 100-w. operations is the same as for 250-w. operations.

Other Applications

The following fees shall accompany each application:

	AM	FM	TV	Translator	Auxiliary [1]
Applications filed on FCC form 316 (where more than one broadcast station license is involved, the application must be accompanied by the total amount of the fees prescribed for each license so involved)	$250	$250	$250	$50	$50
Application for construction permit to replace expired permit, FCC form 321	500	500	500	50	50
Application for modification other than a major change	50	50	50	50	50
Application for change of call sign for broadcast station	100	100	100	..	..
All other applications in the broadcast services (including television translators and auxiliaries)	50	50	50	50	50

[1] With respect to applications for remote pickup broadcast stations authorized under subpart D of part 74 of this chapter, one fee will cover the base station (if any) and all the remote pickup mobile stations of a main station, provided the applications therefor are filed at the same time.

Subscription Television

Application for Subscription Television Authorizations:

Application filing fee $1,000

Assignments and Transfers

Application for assignment of license or transfer of control, exclusive of FCC form 316 applications (where more than one broadcast station license is involved, the total amount of fees prescribed for each license so involved will be paid in the manner set forth below):

Application filing fee $1,000

Assignment and Transfer fee to be paid within 30 days after Commission consent to assignment or transfer—2 percent of consideration for assignment or transfer.

ANNUAL LICENSE FEES

Each broadcast station shall pay an annual license fee to the Commission that is based on the station's rate card. Annually, the Commission will require that each station shall file its rate card (as of a given publicly announced date) with the Commission. The annual fee will be paid on or before (a specific date) each year.

For AM and FM radio stations:

The annual fee will be a payment equal to 24 times the station's highest single 1-minute spot announcement rate, but in no event shall the annual payment for each AM and each FM station be less than $52;

For television broadcast stations:

The annual fee will be a payment equal to 12 times the station's highest 30-second spot announcement rate, but in no event shall the annual payment be less than $144.

(*b*) Fees are not required in the following instances:

(1) Applications filed by tax exempt organizations for the operation of stations providing noncommercial educational broadcast services, whether or not such stations operate on frequencies allocated for noncommercial educational use.

(2) Applications in the AM service requesting only authority to determine antenna power by direct measurement.

§ 1.1113. Schedule of fees for common carrier services.

Applications filed for common carrier services shall be accompanied by the fees prescribed below:

	Filing fee	Grant fee
Domestic public land mobile radio service [1]		
Application for initial construction permit or for relocation of a base station (including authority for mobile units, blanket dispatch station authority,[2] and standby transmitters without independent radiating systems.[3 4]	$75	2 percent of construction cost.

	Filing fee	Grant fee
Application for initial construction permit or for relocation of a dispatch station,[3] control station or repeater station.[4]	25	Do.
Application for modification of construction permit or license for base station, dispatch station, control station or repeater station at an existing station location.	10	Do.
Application for renewal of license for base station.	25	$125.
Application for renewal of license for dispatch station, control station or repeater station.	10	$50.
Application for license, modification of license, or renewal of license for individual mobile stations.	5	$70.
Rural radio service		
Application for an initial construction permit or for relocation of facilities.[4]	25	2 percent of construction cost.
Application for modification of construction permit or license.	10	Do.
Application for license for operation of a rural subscriber station at temporary-fixed locations.	10	$20.
Application for license or modification of license for individual subscriber stations.	5	$20.
Application for renewal of license rural subscriber station.	5	$70.
Application for renewal of license central office Station.	25	$100.
Point-to-point microwave radio services		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to existing points of communication or for relocation of facilities.[4]	50	2 percent of construction cost.
Application for license for operation of a station at temporary-fixed locations.	50	$100.
Application for modification of license.	50	2 percent of construction cost.
Application for renewal of license.	25	$100.

	Filing fee	Grant fee
Local television transmission service		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to an existing station location or for relocation of facilities. [4]	50	$150.
Application for license for operation of an STL station at temporary-fixed locations.	50	$100.
Application for license for operation of a mobile television pickup station.	50	$100.
Application for modification of license.	25	$75.
Application for renewal of license.	25	$50.
International fixed public radiocommunication services		
International fixed public station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station. [4]	150	$500.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter(s) being replaced if both applications are filed simultaneously).	75	$100.
Application for change of location of an authorized station.	150	$400.
Application for modification of license.	25	$100.
Application for renewal of license.	100	$200.
International control station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station. [4]	100	$400.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter being replaced if both applications are filed simultaneously.	50	$250.

	Filing fee	Grant fee
Application for change of location of an authorized station.	100	$400.
Application for modification of license.	25	$100.
Application for renewal of license.	50	$100.
See footnotes at end of table.		
Other radio applications		
Application for assignment of an authorization or transfer of control (a separate fee is required for each call sign covered by the application).	$10	$50.
All other common carrier radio applications, including STA and petitions for waiver of rules.	25	None.
Satellite communications services		
Application for initial construction permit or modification of construction permit for earth station.	500	2 percent of U.S. portion of construction cost.
Application for renewal of license—earth station.	100	$400.
Application for authority to construct and launch satellites.	500	2 percent of combined construction and launch cost.
Application for assignment of an earth station construction permit or license or transfer of control of a licensee or permittee.	100	$200.
Applications by communications common carriers for authorization to own stock in the Communications Satellite Corp.	25	$50.
Any other application filed under the Communications Satellite Act.	25	$50.
Common carrier nonradio applications		
Sec. 214 applications by telephone companies to extend or supplement facilities by construction or lease of wire or cable facilities:		
Domestic.	50	2 percent of construction or annual lease cost.
Overseas (except ocean cable).	50	Do.

	Filing fee	Grant fee
Sec. 214 applications by telegraph companies to extend or supplement facilities by construction or lease of wire or cable facilities:		
Domestic.	25	Do.
Overseas (except ocean cable).	25	Do.
Sec. 214 applications for overseas cable construction.	100	2 percent of U.S. share of construction cost.
Sec. 214 applications for satellite facilities.	100	Do.
Sec. 214 applications to discontinue, reduce or impair service to the public:		
Telephone companies.	50	$50.
Telegraph companies.	10	$15.
Cable landing license.	100	$100.
Sec. 214 acquisition application.	50	$50.
Interlocking directorate applications.	10	$40.
Tariff applications to change charges or regulations on less than statutory notice.	10	$15.
All other common carrier nonradio applications.	10	$15.
Sec. 221 applications.	50	$250.

[1] In this service each transmitter at a fixed location is a separate station notwithstanding the inclusion of more than one such station on a single authorization or under a single call sign.

[2] When included as part of a base station application, a request for blanket dispatch station authority made pursuant to the provisions of Sec. 21.519(a) of this chapter does not require an individual application or fee. A request for such dispatch station authority filed separately from a base station construction permit application requires an application for modification of license and an appropriate fee.

[3] An application for a standby transmitter having its own independent radiating system requires the same fee as a base station application.

[4] No additional fee will be charged for applications for licenses to cover a construction permit unless there is a modification or variation of outstanding authority involved. In that event the appropriate fee for modification is applicable.

[5] This fee applies to any request for dispatch station authority not made pursuant to sec. 21.519(a) of this chapter.

§ 1.1115. Schedule of fees for the safety and special radio services.

(*a*) Except as provided in paragraph (*b*) of this section, the fees set forth in the schedule below shall accompany all applications filed in the safety and special radio services:

Applications for all authorizations except as noted below	$19
Duplicate licenses	6
Interim ship licenses including subsequent initial licenses	25
Operational fixed stations using frequencies above 952 Mc./s.:	
Initial license	35
Assignment of license	35
Common carrier public coast stations:	
Initial license	75
Assignment of license	75
Amateur service:	
Initial license, renewal and new class operator licenses	9
Modification of license without renewal	4
Modifications of license with renewal	9
Special call sign (plus other applicable fee)	25

(*b*) Fees are not required in the following instances:

(1) Applications filed in the police, fire, forestry-conservation, highway maintenance, local government, and State guard radio services.

(2) Applications filed by governmental entities in any of the safety and special radio services.

(3) Applications filed by the following in the special emergency radio service: Hospitals, disaster relief organizations, beach patrols, school buses, and nonprofit ambulance operators and rescue organizations.

(4) Applications filed in the disaster communications service.

(5) Applications for ship inspections pursuant to the Great Lakes agreement, the Safety of Life at Sea Convention, and parts II and III, title III, of the Communications Act of 1934, as amended.

(6) Applications for novice class license in the amateur radio service, applications for amateur stations under military auspices, and applications filed in the "Radio Amateur Civil Emergency Service" (RACES).

(7) Operational fixed microwave applications filed for closed-circuit educational television service.

(8) Applications for civil air patrol stations, aeronautical radionavigation stations and for aeronautical search and rescue stations.

(9) Application or request for an STA or waiver.

(10) Application filed by an alien pursuant to a reciprocal radio licensing agreement.

§ 1.1116. Schedule of fees for cable television services.

(*a*) Applications, notifications, and petitions filed in the cable television services shall be accompanied by the fees prescribed below:

Applications in the Community Antenna Relay Service (CARS):	
For a construction permit	$50
For a license	15
For a modification of construction permit or license	15
Petitions:	
For special relief (other than that specified below), pursuant to sec. 74.1109 (per each petitioner)	300
For experimental operations pursuant to par. 51 of the December 1968 Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397 (see, also, proposed sec. 74.1107 (b) and (c) in App. C of that Notice	25

For waiver of hearing re carriage of distant signals within the grade A contour of a television broadcast station in a top 100 market:

Per proposed commercial (*a*) VHF station or (*b*) network affiliated UHF station, distant signal 25

Per proposed (*a*) educational station, or (*b*) independent UHF station, distant signal .. 10

Notifications pursuant to sec. 74.1105 10

(*b*) The annual financial report filed by CATV system operators shall be accompanied, once a year, by fees determined in the manner prescribed below:

For each system with more than 200 subscribers, a fee equal to the number of subscribers times 0.30

NOTE.—Where a system offers bulk rates to multiple-outlet subscribers, such as apartment house or motel operators, such contracts are not viewed as individual subscriptions for purposes of fee determination. Rather, each such contract is viewed as a number of subscriptions, such number to be calculated by dividing the total annual charge for that bulk-rate contract by the system's basic annual subscription rate for an individual household. (Thus, for example, if a CATV system charges an apartment house operator $1,000 a year for a bulk-rate contract and charges individual households a basic rate of $50 per year, the bulk-rate contract is counted as 20 subscriptions (i.e., 1,000 ÷ 50—20)). It is not contemplated, however, that such calculations should be made with respect to extra payments for additional CATV outlets within the same individual household.

§ 1.1117. Schedule of fees for commercial radio operator examinations and licensing.

(*a*) Except as provided in paragraph (*b*) of this section, applications filed for commercial radio operator examinations and licensing shall be accompanied by the fees prescribed below:

Applications for operator license:

First-class license, either radiotelephone or radiotelegraph, new or renewal $5

Second-class license, either radiotelephone or radiotelegraph, new or renewal	4
Third-class permit, either radiotelephone or radiotelegraph, new or renewal	3
Provisional radiotelephone third-class operator certificate with broadcast endorsement	3
Restricted radiotelephone permit	10
Application for duplicate license or replacement license	2
Application for endorsement of license	2
Application for verification card (FCC form 758-F)	2
Application for posting statement (FCC form 759)	2

(*b*) Whenever an application requests both an operator license and an endorsement, the required fee will be the fee prescribed for the license document involved.

§ 1.1120. Schedule of fees for equipment approval.

(*a*) Type approval, type acceptance, or certification shall require payment of fees as prescribed below. These fees shall be payable in two parts: An application filing fee to be submitted with the application (no application will be accepted for filing without this fee), and a grant fee which must be paid upon grant or type approval, type acceptance, or certification. The applicant will be notified when such grant fee must be paid.

(*b*) The grant fee is based on the manufacturer's selling price (MSP) or, in lieu thereof, the lease price on an annual basis, of the equipment, and also upon the number of units produced. The manufacturer shall compute the grant fee by the formula given below, using his best estimate for the MSP and the number of units to be produced. If the actual MSP turns out to be different from the estimated MSP, the manufacturer shall submit a supplemental payment, or may

file for a refund, as the case may be. Similarly, if the number of units of that model actually produced differs from the number estimated, the manufacturer shall submit a supplemental payment, or may file for a refund, as the case may be.

(*c*) Certification.

	Filing fee	Grant fee [1] [2]
1. Application for certification of each receiver model [3]	$10	0.02
2. Application for certification of each low power communication device [3] [4]	10	.01
3. Application for prototype certification of equipment operating under pt. 18 [3] [4]	20	.05
4. Request for modification of a certificated receiver or low power communication device with no change in model number [5]	10	None
5. Request for modification of a prototype certificated equipment operating under pt. 18 with no change in model number [5]	20	None
6. Application for certification of a low power communication device sold in kit form [3] [4]	10	.01

[1] Number of units = number of units which have been produced bearing the model number for which certification has been requested.

Number of kits = number of kits which have been produced bearing the model number for which certification has been requested.

[2] Percent of manufacturer's selling price, multiplied by the number of units produced.

[3] Both a filing fee and a grant fee must be paid for each receiver model for which certification is requested regardless of whether these models are listed in one application or a separate application is submitted for each model.

[4] A fee must be paid for each low power communication device bearing a separate trade name and/or model number.

[5] A request for modification of a certificated equipment which involves a change in type (or model) number will be considered as an application for a new certification under items 1, 2, or 3 of the schedule.

NOTE 5.—A filing fee, but not a grant fee, must be paid for each receiver which is part of a transceiver or of equipment in which one or more receivers and transmitters are packaged as an individual unit and identified by a common equipment model number. The certification and accompanying filing fee should be submitted at the same time as application for type acceptance of the associated transmitter(s) is made.

(*d*) Type acceptance.

	Filing fee	Grant fee
Application for type acceptance of each equipment type [1]	$100	[2] 0.6
Application for the addition of one or more radio services (i.e., aviation, industrial, etc.) to existing type acceptance for each equipment type, as identified by manufacturer (or trade name) and type number	100	None
Application for permissive change in type accepted equipment. (This is applicable only to permissive changes of the second classification as set forth in sec. 2.584(e) of this chapter.):		
(1) Where no change in type number is required	100	None
(2) Where a change in type number is required	100	[2] .6

[1] Applications for type acceptance of equipments which bear different identification will be considered as separate applications, regardless of whether such equipments may be otherwise identical.

[2] Percent of manufacturer's selling price multiplied by the number of units produced.

(*e*) Exceptions.

Fees for type acceptance are not required in the following cases:

(1) When a request for type acceptance is included in an application for station license and covers only items of equipment to be authorized in that particular station.

(2) When a request is made by the licensee of a station for approval of modifications to a specific item or items of existing type accepted equipment authorized in that particular station.

(*f*) Advance approval of subscription television systems.

	Filing fee	Grant fee
For advance approval of each subscription television system	$1,000	[1] 0.1

[1] Percent of manufacturer's selling price multiplied by the number of units produced.

NOTE.—MSP in this case is the manufacturer's selling price ,or, if no sale takes place, the lease price on an annual basis for each decoding device for a subscriber's receiver. Number of units produced is the number of decoding devices to be produced for use with subscribers' receivers.

(*g*) Type approval.

	Filing fee	Grant fee
Application for type approval (including an application for modification of existing type approved equipment, which modification requires retesting)	$500	[1] [2] 0.5
Application for modification of existing type approved equipment, which modification does not require retesting	100	None
Application for type approval of equipment to be operated under pt. 15 of the rules (low-power devices)	100	[1] 0.5

[1] Percent of manufacturer's selling price multiplied by the number of units produced.

[2] For equipment to be operated under pts. 81 and 83 of the rules, the number of equipments produced is, for the purpose of computing grant fees, that number of equipments produced to which the FCC type approval number is affixed. Equipments produced and installed on vessels of foreign registry need not be included in the computation of grant fees.

[Caption Omitted in Printing]

Supplemental Notice

(Adopted March 4, 1970)

BY THE COMMISSION:

1. This supplemental notice is issued because of requests received by the Commission for further information concernnig the proposed fee schedules for the various services contained in the notice of proposed rulemaking in Docket No. 18802.

2. The Commission's process starts with direct costs for each bureau/office concerned, as reflected in our annual budget requests. There is then added to such direct costs of other bureaus or offices which are directly attributable to the service involved; e.g., the costs of activities of the

Field Engineering Bureau are distributed among Broadcasting, Common Carrier, and Safety and Special Services in the Proportion of activity devoted to each service. Thereafter, the Commission's remaining costs not directly amongst the bureaus and offices, pro-rated on the basis of direct costs.

3. Activity costs thus derived are shown in the following table, both in terms of dollars and in terms of percentages of the total Commission budget request.

	Costs	Percent
Broadcast	$9,661,200	38.8
Cable television	1,145,400	4.6
Chief engineer	323,700	1.3
Common carrier	4,631,400	18.6
Field engineering	1,294,800	5.2
Safety and special radio	7,843,500	31.5

4. It should be emphasized that the foregoing figures reflect only the "cost" factor considered in the proposed fee schedule, and that other criteria, such as value to the recipient and public policy or interest served, are also and will continue to be considered, in arriving at a practicable, fair and equitable method for formulating the proposed fee schedules.

5. The issuance of this supplemental notice will not serve as a basis for grants of extensions of time in which to file comments.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

[Caption Omitted in Printing]

Memorandum Opinion and Order

(Adopted April 16, 1970)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE ABSENT; COMMISSIONER WELLS DISSENTING.

1. The Commission has before it the National Cable Television Association, Inc.'s (NCTA), April 8, 1970, petition for review of action taken by the executive director in his March 25, 1970, letter to NCTA. In that letter, the executive director substantially denied NCTA's March 2, 1970, request to inspect alleged documents or records supposedly in the possession of the Commission. These records, according to NCTA, contain information useful to it in preparing comments on the notice of proposed rulemaking in docket No. 18802. (released Feb. 19, 1970), which proposes to alter the Commission's schedule of fees.

2. After examining NCTA's April 8 petition in light of the other aforementioned documents, the Commission finds that the petition does not present any considerations which would in our opinion justify the requested review. Moreover, we find that, in requesting to inspect a vast array of information and data which might have been utilized by the Commission or its staff in conjunction with the proposed fee schedules, NCTA's petition is not a request for disclosure of the nature contemplated by the Public Information Act of 1966 or by the Commission's public information rules, 47 CFR 0.441 et seq. Since the Commission's notice of proposed rulemaking reflects no reliance on, or reference to, any particular document or data, petitioner's request is rather in the nature of a fishing expedition. In this connection, we reiterate that the proposed schedule of fees in docket No. 18802 represents essentially a distribution of the Commission's total operating costs among various communications activities in proportion to the effort expended by the Commission in regulating each of those

activities. Thus, as explained in the supplemental notice (released Mar. 4, 1970), the Commission has derived a proposed schedule of fees for CATV systems which in the aggregate would return a sum equal to the aggregate operating costs of the Commission in regulating the systems. The Commission has further determined that these aggregate costs of CATV regulation would be most equitably distributed among the systems primarily by assessing each system with over 200 subscribers an annual fee of 30 cents per subscriber. Therefore, the derivation of the proposed schedule of fees for CATV systems follows an uncomplicated logic. The Commission would welcome any comments which NCTA might wish to make with respect to this derivation.

3. Accordingly, *It is ordered,* That NCTA's April 8, 1970, petition for review *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

MARCH 25, 1970.

NATIONAL CABLE TELEVISION ASSOCIATION,
918 16th Street, N.W.,
Washington, D. C. 20006

Attention: Gary L. Christensen, Esq., General Counsel

GENTLEMEN: This is in reply to your March 2, 1970, letter requesting permission under 47 CFR 0.461(a) to inspect the Commission records referred to below. The stated purpose of the request is to obtain information useful in preparing your comments on the Commission's notice of proposed rulemaking, in docket No. 18802 (released Feb. 19, 1970), which proposes to alter the Commission's schedule of fees.

Your letter initially requests the right to inspect the annual and the inventory reports of all user charges of the

Commission submitted to the Bureau of the Budget on standard form No. 4 on or about September 30, 1969. The annual report was prepared solely at the direction of the Bureau of the Budget circular A-25-supplement 1. This interagency report is regarded as the property of the Bureau of the Budget, and your request would more appropriately be directed to the Bureau of the Budget itself. See 47 CFR 0.451(b)(3). In light of the foregoing, it would be improper to grant your secondary request to inspect the Commission staff's working papers in support of the annual report. On the other hand, the inventory of user charges is nothing more than a schedule of fees, and the Commission's schedule is set forth in part 1, subpart G, of the rules, 47 CFR 1.1101 et seq.

Your letter further requests the right to inspect the Commission's budgetary requests for the fiscal years 1969, 1970, and 1971. These budgetary requests were prepared at the direction of the Bureau of the Budget, and what has been said above concerning annual reports of user charges is equally applicable here. However, as you may not be aware, budgetary information for fiscal years 1969, 1970, and 1971, is contained in "Budget of the U. S. Government—1971," which is available to you from the Superintendent of Documents.

Finally, your letter requests the right to inspect the documents used in determining the direct and indirect cost to the Government and the value to the recipient of the privileges granted as set forth in the notice in Docket No. 18802. With respect to the direct and indirect cost to the Government, we note that your letter was submitted before the March 4, 1970, release of the Commission's "Supplemental Notice" (F.C.C. 70-239). Since the supplemental notice contains information as to the costs of the Commission's various activities, a copy thereof is enclosed herewith. With respect to the value to the recipient of the privileges granted, the Commission and its staff relied upon their

knowledge of the financial aspects of the communications industry acquired over the years from vast numbers of confidential financial statements, confidential staff memoranda, and various trade publications. Consequently, your blanket request to inspect all of this information must be denied because it cannot be identified and assembled without totally unreasonable expenditures of Commission manpower.

Sincerely yours,

MAX D. PAGLIN,
Executive Director.

F.C.C. 70-694

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SUBPART G OF PART I OF THE COMMISSION'S RULES RELATING TO THE SCHEDULE OF FEES

Docket No. 18802

Report and Order

(ADOPTED JULY 1, 1970; RELEASED JULY 2, 1970)

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COMMISSIONER WELLS DISSENTING.

1. In a Notice of Proposed Rule Making adopted February 18, 1970,[1] the Commission set forth its proposal to revise the existing schedule of fees on a broad basis. While the present proceeding is a reflection of the Commission's continuing review of this subject matter, its proposals reflect widespread changes in the existing fee schedule, de-

[1] A Supplemental Notice was adopted and issued on March 4, 1970.

signed insofar as possible to return to the federal government the amount of funds appropriated by the Congress for the Commission for FY-1971. Comments, both formal and informal, were received in large number and have been fully considered in the Commission's continuing analysis of such matters.[2]

2. The Commission first adopted rules providing for a schedule of application filing fees in 1963 (Docket No. 14507, FCC 63-414, 28 Fed. Reg. 4658; FCC 63-856, 28 Fed. Reg. 10911) and the initial fee schedule became effective on March 17, 1964. In adopting that fee schedule, the Commission stated that it would undertake a continuing review of the schedule. This continuing review has since been carried forward on a regular basis and a number of changes and modifications have since been made in the original schedule. In the current review and its attendant changes, we have fully considered the thrust of the legislation which vested authority in the Commission to establish the original schedule. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483 (a)) and is applicable to all Federal agencies, reads as follows:

It is the sense of the Congress that *any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing or valve or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency* (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations or businesses), except those engaged in the transaction of official business of the Government, *shall be self-sustaining to the full extent possible and the head of each Federal agency is authorized by regulation*

[2] A list of the parties filing comments, formal and informal, would be too large to warrant reprinting.

(which in the case of agencies in the Executive Branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) *to prescribe therefor such fee, charge, or price, if any, as he shall determine,* in case none exists, or redetermine in case of an existing one, *to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts,* and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this Title shall repeal or modify existing statutes prescribing basis for calculation of any fee, charge or price, but this provision shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. [Italic supplied].

3. The fee schedule initially adopted in 1964 established nominal fees and produced fee revenues which approximated 25% of the Commission's annual appropriation at that time, and subsequent changes in the fee schedule have generally maintained the same ratio between fee revenues and our annual appropriations. However, after judicial affirmation of the Commission's authority to establish a schedule of fees, the Bureau of the Budget has regularly urged the establishment of higher fee schedules and many other agencies have taken steps to adopt fee schedules calling for higher fees. In 1969, the House Appropriations Subcommittee expressed its concern about the Commission's fee schedule and stated that,

> The Committee also feels that fee charges should be further reviewed and adjusted upward with the objective of assuring that the activities of the Commission are more nearly self-sustaining. The Committee will expect a report on these items during the budget hearings for 1971.[3]

[3] House Report 91-316, June 19, 1969, pages 7 and 8.

Thereafter, the Conference Committee on the Independent Office Appropriations Bill, 1970, supported the views stated above, stating with respect to our fee schedule that,

> The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.[4]

Since the issuance of the Notice of Proposed Rule Making in this proceeding, in hearings on the Commission's appropriation for FY-1971, both the House and Senate Appropriations Subcommittees reiterated their view that the Commission should establish its schedule of fees on a basis which would make it self-sustaining to the fullest extent possible. The fee schedule adopted herein, as a revision of the initial proposal, has been prepared in the light of these executive and congressional directives and, based upon a reasonable projection of our activities during the coming fiscal year, should produce fee revenues which will generally approximate our estimated expenditures for FY–1971.[5]

4. Comments received from various industries affected by the Commission's fee schedule proposed in the Notice indicated a wide disparity between the resulting fee revenues as estimated by the Commission and as estimated by the industries affected. Though comments of this nature were widespread, they had particular emphasis in the area of common carrier regulation and equipment approval action. Particular scrutiny has been paid to these contentions and the fee schedule adopted herein now sets forth not only more simplified methods for establishing the amount of in-

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[4] House Report 91-649, November 18, 1969, page 6.

[5] This includes not only the expected regular appropriation of $24,900,000, but also additional expenditures deriving from the more recent federal salary increase.

dividual fee charges, but also a schedule of charges which have been carefully designed to reach an estimated total revenue within a reasonable range of the Commission's appropriations for FY–1971. In arriving at this goal, the Commission has given considerable but not exclusive consideration to its allocation of the cost of Commission activities as set forth in its Supplemental Notice of March 4, 1970. This breakdown of activity costs, both in terms of dollars and in terms of percentages of the total Commission budget request, is as follows:

		Percent
Broadcast	$9,661,200	38.8
Cable television	1,145,400	4.6
Chief engineer	323,700	1.3
Common carrier	4,631,400	18.6
Field engineering	1,294,800	5.2
Safety and special radio	7,843,500	31.5

It must be emphasized that these figures reflect only the cost factor and that other criteria such as "value to recipient" and "public policy and interest served" have also been considered in establishing the fee schedule set forth herein on a practicable, fair and equitable basis: In this connection, numerous comments were to the effect that where the Commission determined that public policy considerations warranted various exemptions from the fee schedule, e.g., state and local governments, non-profit licensees, etc., the cost of regulation of such activities should in effect be deducted from the total fee revenues sought to be obtained by the Commission. These comments overlook the fact that there is no requirement that individual fee charges must be tied directly to processing costs or that individual activity costs set an outer limit for fee revenues resulting from such activity. The statutory objective is that the Commission shall establish a fee schedule which, after consideration of all of the factors referred to in 31 U.S.C. § 483(a), should produce total revenues which would make

the Commission self-sustaining to the fullest extent possible. This general objective encompasses within it not only appropriate variations amongst the different Commission activities and staff units, but also appropriate variations between annual appropriations which may be enacted by the Congress sometime after the beginning of the fiscal year, and may reflect changes from our budget request, and estimated fee revenues which must be based only upon projections of future activity and of the future impact of fee charges on the extent of such activity.[6] As revised from the initial proposal and keeping in mind the imponderables described above, it is estimated that the fee schedule adopted herein will produce the following revenues:

Broadcast Bureau	$9,600,000
Cable Television	1,145,000
Chief Engineer	355,900
Common Carrier	4,700,000
Field Engineering Bureau	2,007,300
Safety & Special Radio	7,750,300

The total revenue on a Commission-wide basis is $25,558,500, if the fee schedule were in effect for the entire fiscal year 1971.

5. Many comments alleged that the Commission's proposed fee schedule constituted a system of taxation which was beyond the authority of the Commission. It is clear to us, however, that the fee schedule adopted herein is directly tied to "work, service . . . benefit, privilege . . . franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued" by the Federal Communications Commission, and that the fees set forth in such schedules are

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[6] Thus the Commission anticipates that the increase in the fee for restricted radio-telephone permits will operate to decrease the number of applications received for such permits although the extent of such cut-back is not presently ascertainable.

fair and equitable and have been established after taking into consideration direct and indirect cost to the government, value to recipient, public policy or interest served and other pertinent factors. As such, the fee schedule adopted herein, like its predecessor, is clearly within the authority of the Commission under Title V of the Independent Office Appropriations Act of 1952. (See *Aeronautical Radio Inc.* v. *F.C.C.*, 335 F 2d 304; *cert. den.* 379 U.S. 966.)

6. As described in the Notice, the fee schedule adopted herein imposes fee in two additional areas which are not now subject to fees of any kind, but are the subject of Commission regulation and which directly or indirectly receive what in effect is a Commission authorization tantamount to a "license." The first area concerns Community Antenna Television systems which, as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations adopted during the past five years. The Commission's authority to regulate the conduct of CATV activities under various permissive and restrictive regulations was affirmed by the U.S. Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Its regulation of this type of interstate communication service now constitutes a substantial portion of the Commission's responsibilities, and a major staff unit has now been given permanent status to deal with this area. While the Commission's regulatory approach does not require a prior approval by the Commission in the form of a "license" before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations. There, therefore, appears to be no reason for distinguishing this service from other communications services which the Commission authorizes and which are now encompassed in the present fee schedule.

7. The second additional area of Commission regulation and authorization reflected in the revised fee schedule adopted herein is in the field of radio frequency equipment testing and approval. The Commission long ago established technical standards for various kinds of radio frequency equipment which could be used under Commission authorization. While these restrictions were imposed upon the users of radio frequency equipment, the Commission permitted equipment manufacturers to avail themselves of its testing, review and approval procedures.[7] Having obtained Commission approval in advance, radio equipment manufacturers were thereby enabled to assure prospective purchasers that the equipment was in compliance with the Commission's technical standards applicable to such radio equipment. Subsequently, the enactment of Section 302[8] of the Communications Act established a prohibition against the importation, shipment or sale of radio frequency devices which did not comply with Commission regulations in this area. Rules have now been adopted, effective October 1, 1970, which would require type approval, type acceptance or certification of such devices prior to their importation, shipment, or sale.[9] Thus, in effect, the equipment approval actions of the Commission will be tantamount to an authorization which must be obtained prior to importation, shipment or sale of radio frequency devices. The Commission's activities in this area are not insubstantial and currently average some 1800 type approval, type acceptance and certifications, annually. The fee schedule, therefore, includes an appropriate schedule of fees for these various kinds of radio frequency equipment approval actions.

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[7] "Type Approval" procedures involve equipment testing by the Commission's laboratory. "Type Acceptance" and "Certification" procedures involve testing by the equipment manufacturer and analysis of test measurements by Commission engineers.

[8] 47 U.S.C. § 302.

[9] Docket No. 18426, 34 F.R. 1057.

8. Some further observations of a general nature may be in order as to the considerations which have been taken into account by the Commission in establishing the separate license or authorization fees included in the proposed schedule. These have been established in light of the differing factors which are unique to one or another of the many communication services under the broad ægis of the Commission. For example, licenses in the broadcast services are by statute limited to a maximum of three years, while the grant of certificates of public convenience and necessity for common carrier communication services under Section 214 of the Act are without such time limitations. The latter situation also applies to equipment approval actions and our authorization, by rule, of CATV system operations. Similarly, the "value of the recipient" factor needs be considered on a different basis amongst various services by reason of their different characteristics and operations. Broadcast services are commercial enterprises which exist on an "advertiser-supported" basis, without direct charge to the listening public, while common carrier communication companies provide their services to all users at charges set forth in tariffs. On the other hand, CATV systems operate on a somewhat similar basis as common carriers, but their provision of but one kind of service to each subscriber.

8. Some further observations of a general nature may be at the same price permits a different approach in considering "value to the recipient" than is possible with communications common carriers which utilize the same facilities for the provision of different services to different customers. Again, our equipment approval actions are taken with respect to many different types of equipment, and our consideration of the "value to the recipient" factor in establishing fees needs consider the small amount of processing costs involved. We have therefore selected different bases for considering "value to the recipient" both for different types of actions within each service and similar types of action among different services, which we believe are fair and

equitable. We fully recognize that the factors we have used may not wholly or precisely reflect "value to the recipient". But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard. Revenues of our broadcast licensees in 1968 approximated 3.5 billion dollars. Revenues from our authorized common carrier communication services in 1968 came close to 16 billion dollars. In the same year, CATV system revenues approximated $220,000,000 and in 1968, total sales of communications equipment under our equipment approval actions exceeded 3 billion dollars. Obviously, these figures are the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations to the persons and companies receiving them. Nonetheless, they do serve to place in perspective the very limited extent to which the Commission has considered the "value to the recipient" factor in establishing the fee schedule adopted herein.

9. Other factors taken into consideration by the Commission in establishing a schedule of fees warrant mention. Simplicity of computation and ease in the adminstration of of the fee system is reflected in the different approach being adopted in the schedule of fees for equipment approval actions. The tremendous number of applications filed in the Safety & Special Radio Services, in excess of 562,000 annually, together with the minimal percentage of denials of such applications militates against the establishment of separate application filing fees and license fees at this time because of the tremendous paper work involved. Where feasible, groupings have been made of different kinds of applications and authorizations and a common fee established for the entire grouping in order to avoid undue compexity. Finally, it may be noted that the widespread use of restricted radiotelephone permits for purposes other than

use of communications equipment has led to an increase in the fee for this life-time permit which is designed to cut down on the demand for this kind of authorization.

10. *Effective Date of New Fee Schedule.* The Fee Schedule adopted herein is being made effective as of August 1, 1970. While the demands of time and workload may not permit publication in the Federal Register at least 30 days prior to August 1, 1970, the Commission believes that good cause exists for the adoption of this effective date. Actual or constructive notice will, in fact, be given to the industries and persons affected through the publication and release of numerous copies of this Report and Order by the Commission's Information Office immediately after adoption. Publication in the Federal Register should take place not later than the week of July 5–July 11, 1970 and widespread notice of the newly adopted fee schedule will undoubtedly be given by the press and numerous trade publications in the field. Since the fee schedule adopted herein sets forth annual fees in several areas, and since there will be pro-ration of such fees on a monthly basis for the balance of the first year, it is necessary that the fee schedule be made effective as of the beginning of the month, and, in accordance with the Congressional directives cited above, that it cover as much of fiscal year 1971 as is reasonably possible.

11. *The impact of effective date.* Under the effective date of August 1, 1970, all applications received by the Commission on and after August 1, 1970, will be subject to the new fee schedule. Grants made on or after August 1, 1970, will not be subject to applicable fees if the application for such grant was filed with the Commission prior to July 1, 1970, the date of adoption of the new fee schedule.[10] Annual fees for broadcast stations are payable on the anniversary date of the expiration of the license, and in the first year

[10] It is to be understood, of course, that application processing during the period between July 1 and August 1 will proceed on the normal course, and action will not be held up because of the imminence of the August 1 grant date.

under the new fee schedule, the fee is to be pro-rated over the number of full months of operation beginning on August 1, 1970, until the next payment date. The annual fee for CATV systems is payable on or before April 1 of the year following the calendar year to which the fee payment relates. Since the CATV annual fee will go into effect on August 1, 1970, the amount payable in 1971 will be prorated to reflect the fact that the fee applies only to the last five months of 1970.

12. *Collection Procedures.* Rules adopted herein set forth procedures for the collection of fees which are designed to make these operations as simple as possible. Fees that are established for the filing applications must accompany the application. In the absence of such fee, the application will not be considered by the Commission. Where fees have been established in connection with the issuance of a grant or authorization by the Commission, the prescribed fee will be payable within 45 days after the issuance of the grant or authorization. While the Commission will not hold up the issuance of such grants or authorizations, the rules provide that they will be conditioned upon subsequent payment of the fee within the prescribed time, and failure to make such payment will result in cancellation of the grant or authorization. Annual fees will be payable in the broadcast services on the anniversary date of the expiration of the license, and in CATV on or before April 1 of the year following the calendar year to which the fee payment relates. Failure to pay such fees in the prescribed fashion may call for appropriate remedial action by the Commission under Section 312 until the requisite fee has been paid.

13. *Special Temporary Authorizations and Waivers.* As set forth in paragraph 15 of the Notice, some 15,000 applications for special temporary authorization or for waiver under the Commission's rules are filed with the Commission annually and relate to all of the services en-

compassed in the fee schedule adopted herein. We have determined that it is appropriate to establish fees for the grant of STA's or waivers which represent a marked departure from our rules because of unusual circumstances and situations, or which encompass dispensation or authorization of an important character, or entailing special efforts on the part of the Commission in processing them. The grant of STA's or waivers which look simply to minor departures from our rules or to temporary operation of short duration will not be subject to fees. The different schedules adopted herein now prescribe fees ranging from $5 to $25 for the grant of STA's and waivers of the former type. It is not possible to definitively set forth all of the STA's and waivers which are of such an important character as to warrant the payment of the prescribed fee. This will be determined by the Commission at the time the application for STA or waiver is considered, and upon issuance of the grant, the recipient thereof will be notified of his liability for payment of fees, if any.

Broadcast Services

14. Of the comments filed by the broadcasting industry or broadcast oriented associations, two comments were in general support of the fee schedule as proposed. The other parties opposed the fee schedule, either in whole or in part. The comments in opposition raised three types of challenges: (1) the general challenge of legality to the entire fee schedule: (2) excessive allocation of fee burden to the broadcast industry: and (3) specific challenges to certain portions of the proposed fee schedule. The general legal arguments and allocation questions have been discussed above. Therefore, this portion of the Report and Order deals only with the comments directed at the broadcast fee schedule as proposed.

15. *Fees for Construction Permits.* The few comments concerning fees for construction permits dealt primarily with the proposition that fees from construction permit

applications would have a deterring effect on qualified persons filing for new facilities and a very undesirable effect on existing broadcasters that need to improve their facilities. It is claimed that the result of these fees is that needed local service will be curtailed in small markets, and that needed improvement to marginal facilities will either be delayed or forestalled completely.

16. The Commission has considered the comments of the parties with respect to the following contentions. Based on all the factors, i.e. activity costs in the broadcast field, value to recipient, public policy or interest served and other factors, we believe the fees are realistic in relation to the fees in the other services. On April 14, 1970, the Commission broadened the definition of "minor change" applications. Therefore, significant changes can now be made to an existing station's facilities under this new interpretation. While experience may prove a different result, we do not believe that the fees for applications for construction permit for new facilities or major changes in existing facilities will have a significant effect on a person's overall decision to apply for a new or improved facility.

17. Several parties urged that involuntary major modifications, such as the pending move of the antenna systems of the New York television stations to the World Trade Center, should not be subject to the new fee schedule. It is difficult to formulate a general rule in this type of case and, in many cases, a substantial improvement in facilities may take place. Section 1.1105(a) of the present rules reflects commission consideration of this type of problem and will continue as the guide for action in specific cases.

18. For purposes of clarification in the assessment of fees for construction permits for standard broadcast stations, operating with different power day and night, the applicable fee will be for the highest power requested. For example, if the application calls for power of 250w, 1 kw-LS, the fee for a 1 kw operation would be the one assessed.

19. *Fees for Assignment and Transfers.* A large number of comments concerning this portion of the broadcast fee schedule were directed to both the substance of the fee schedule and to the necessity of adopting certain specific procedures for administration of the assignment and transfer fees. In assignment and transfer proceedings, the Notice proposed that the fee would be payable within 30 days after the Commission consented to the assignment or transfer. Several parties urged that this payment schedule could cause numerous problems because the cash for payment of fees is often not available until the transaction has been consummated. It is also pointed out that many sales are never closed due to changed circumstances, and thus the grant fee would not be required. Because of uncertainties of the date of closing and other factors, the Commission has revised the rule so that the new licensee or transferee will become liable for the grant fee only upon consummation of the assignment and must transmit such fee at the same time that the Commission is notified of the consummation.

20. Some of the parties have raised the question whether the assignor/transferor or assignee/transferee is liable to the Commission for the fee. While the financial burden may be allocated as between the parties by contract, the assignee/transferee would be liable to the Commission for payment of the requisite fee.

21. The parties have also urged that assignments and transfers *from* receivers, trustees in bankruptcy, and persons who have taken title from an insolvent or bankrupt licensee, *to* a new ultimate licensee should be exempt from the grant portion of the fee. The basis of their comment is that the grant fee will serve to reduce the ultimate distribution to the creditors of an unsuccessful licensee. The grant fee may well have an effect on the overall sales price of the broadcast stations, but the Commission believes the assignee or transferee, as well as the interim licensee and the creditor, receive substantial benefit from the Commis-

sion's action. For instance, competing applications cannot be filed against the application filed by the receiver. Also, the buyer will be one who is financially qualified to perform under the contract, thus giving certainty for the creditors. The Commission believes that the general rule should obtain.

22. With respect to the filing and processing of the assignment and transfer applications, the parties filed numerous comments relating to the computation of the consideration for the assignment or transfer. The Commission is well aware of the difficulty of computing the consideration in cases where cash or other ascertainable market value is not specified. However, there is consideration to support the assignment or transfer in all cases, and the amount of the consideration is therefore a question of fact. The three most difficult areas will be the cases (a) in which the broadcast properties are only a portion of an entire sale such as one corporation buying a multi-media corporation, (b) cases in which there is no readily ascertainable market value for the consideration, such as the case involving transfer of stock of a closely held corporation, and (c) cases that involve consultant and non-competition agreements. In the case in which the broadcast properties are just a small part of an entire transaction, the question becomes one of allocating a portion of the consideration to them. The rule of reason will be followed in this matter. For instance, if separate corporations are or will be in existence for the broadcast properties, a reasonable allocation has to be made for tax purposes. In all likelihood, the Commission would accept such valuation. Or, the relative value of the underlying assets may be the most reasonable basis for allocation. If the amount of the consideration is not certain or readily capable of being reduced to certainty, we would encourage the parties to confer with appropriate Commission personnel for assistance in determining the amount of the consideration allocable to the broadcast portion of a transaction. The Internal Revenue Service bases

many of its computations involving gain or loss on the sale of property on the "amount realized", which is a fair-market value concept. The Commission would, in the absence of unusual circumstances, accept this valuation in non-cash transactions as the amount of the consideration for basing the fee. The Commission realizes that some additional work is being placed on the parties in this regard, but fair-market value is a sufficiently definite standard on which to base fees in cases such as those involving a transfer of stock in a closely-held corporation. Insofar as amounts paid for consultant and non-competition agreements that are a part of the overall price of a sale, the Commission will follow the general principle of tax law, which permits a reasonable allocation of the total price to such agreements.

23. In the assignment and transfer field, the comments raised other specific questions. One is that fees should not be assessed in divestiture cases based on the decision in Docket No. 18110, the so-called "one-to-a-market" proceeding. Here again, Section 1.1105(a) will serve as a guide to Commission action in this area. Certain parties have raised the question that an appearance will be created that one of the considerations of the Commission in favorably acting on an application will be the fee return. The Communications Act *requires* the Commission to make certain specific findings with respect to the grant of an application that cannot be abrogated except by Congress. There is no substance to the parties' contention. One other specific objection to the assignment and transfer grant fees has been raised. This is that the assignment and transfer grant fee and the annual operating fee amount to a "dual levy" on a station. The contention rests on the fact that the Notice stated that future profitability of a station is reflected in the sale price which amounts to "value to the recipient"; and, since, the annual operating fee is based on the "rate card", it also is a measure of value. However, it is clear that value to the recipient does not rest on any single fac-

tor in any case. In sales, the fact that a person's purchase application is insulated from a competitive hearing has very significant value. Future profitability, as well as other things are factors in arriving at the purchase price. The annual operating fee is based on a going-concern concept of value. The two charges rest on different, but not inconsistent concepts. Certain parties contend that the 2% grant fee in assignment and transfer cases is unfair because it does not appropriately reflect "cost to the government". However, the applicable statutory basis for our fee collection authority recognizes many factors, including "direct and indirect cost to the government", "value to the recipient", as well as others in setting fees. Another point raised is that the 2% fee could have a dampening effect on interested buyers of marginal stations. This may be true in some cases, but the fee is just one factor of many in a buyer's mind as he assesses a purchase of a broadcast station.

24. *Annual operating fees.* As we noted above, a substantial number of parties filed comments in this area alleging that the Commission is without authority to assess the annual operating fee. Certain specific objections were also raised. The major area of specific comment was directed at the use of the rate card as an index of value of the station's license. One of the arguments is that the rate card is just one factor to be considered in determining the value of a station's license. The thrust of a number of comments is that one station may have a low rate card, a high concentration of commercials and skimpy programming, while another may try to limit the frequency of commercials by having a higher spot rate. No doubt, various stations in a market will have different sales policies. This will result in different spot rates, but it is an objective index of value. The Commission is well aware that some disparity as to value exists. Over the long run, we believe that the spot rates will prove to be a feasible index of value. Licensees will therefore be required to file with the Commission a copy of the rate card in effect on June 1 of each

year. The rate card must be filed at the time the annual operating fee is payable (i.e. anniversary license date). Any licensee claiming that the June 1 rate card is not reasonably descriptive of its yearly average may petition for filing of a more appropriate rate card.

25. A more specific objection is the one that stations rarely sell a highest one minute (radio) or 30 second (TV) spot announcement. Therefore, licensees will revise their applicable spot rates to reduce the amount of the annual operating fee. Licensees may well revise spot rates, but the amount of their respective rates will be in the public file. This will cause parties to file realistic data in relation to competitors. In the forseeable future, at the time a review of fees is made, we may find that another rate, such as the "5 times" the highest rate will be more feasible. The spot rates used in the proposed schedule will be adopted, subject, of course, to a continuing review of fees.

26. Specific comments requested clarification as to joint AM-FM rates and rates for satellite television stations. The Commission will permit the payment of a single fee for joint AM-FM rate operations based on the highest one minute joint rate. No allocation will be required at this time between AM and FM. If satellite television stations are sold as a package with the parent station, a single annual fee will cover both operations.

27. Some comments claimed that the notice was ambiguous as to whether renewal application fees would be abolished if the annual operating fee concept were to be adopted. We wish to clarify the matter by stating that, upon the effective date of the fee schedule, renewal fees for all broadcast applications will be abolished in favor of annual operating fees.

28. While many comments objected to the size of the annual operating fee; the Commission finds that the multiple of 12 and 24 for television and radio, respectively, when

applied to the spot rate, is not excessive when considering the value of the license. However, a number of the parties have urged that the Commission grant some relief from the annual operating fee in marginal and hardship cases. Primarily, the claim is that small market radio and UHF stations may be forced to curtail service and, in some instances, cease operations. The parties further point out that the annual fees are being added at the time that broadcast stations are suffering other revenue losses such as curtailment of cigarette advertising revenue and discounts for political broadcasting, as well as advertising competition from CATV. The parties note further that stations must also bear the recently increased transmission costs charged by American Telephone & Telegraph Company. The comments also pointed out that, based on the Commission's own data, 28% of all AM and FM operations, 65% in independent FM operations, 14% of the VHF television stations, and 55% of the UHF stations reported losses. The Commission is very aware that broadcasting is a competitive industry and takes notice of the significant number of unprofitable stations in the industry. We have considered the comments of the parties, especially as to the question of whether the annual operating fees will cause a diminution of program service by broadcast stations, in general, and marginal stations in particular. However, in the case of television stations, the annual operating fee will only be equivalent to the stations' charge for one spot announcement each month and for radio, two spots per month. Such fees should not constitute a significant burden in a broadcast station's total operations. The Commission will maintain a continuing review in this area and, if the facts indicate a change is necessary, it will be made. We therefore adopt this annual fee schedule for all broadcast licensees.

29. Comments were submitted which urged that the Commission re-examine the question of the desirability of charging fees for station auxiliaries. Since the renewal application fee has been abolished for the parent broadcast sta-

tions, and the auxiliaries are an integral part of the broadcast operation, the annual operating fee is reflective of the entire operation. Therefore, separate fees for renewal applications of broadcast auxiliaries are also being eliminated.

30. With respect to translators, several parties urged that all fees be abolished for television translator stations. The prime ground urged is that very few translators are profit making either in nature or practice and do bring sorely needed service to remote areas, and therefore any fee is a hardship. Since the annual operating fee is also a reflection of the feeder television station and all translators carrying it, we believe that fees for renewals of translators should similarly be eliminated. The few nominal fees for construction permits for translator stations are also being eliminated, because many translators are community owned and are not operated for profit. While a few translators may be operated for profit, the small loss of revenue, when balanced against the necessity of classifying various types of translators, enables us to reach that result.

31. We also received very specialized comments requesting exemption from fees for broadcast stations operated by organizations that are exempt from paying income taxes, even though the stations are not classified as noncommercial educational stations, but who do not accept commercial spots or any commercial sponsorship. Also some college broadcast stations, that operate on a limited commercial basis, requested an exemption from the grant portion of the fee for construction permit. The Commission does not have sufficient factual data to enable it to classify and delineate specific exemptions to stations that do not operate commercially, but who are not classified as noncommercial educational stations. Therefore, we will not "carve out" any exemptions in this class at this time, but will examine the matter in future reviews.

32. One party urged that the Commission adopt fees for the processing of data filed by the networks. The Commis-

sion believes that it would be inappropriate to adopt such a schedule at this time, but we will maintain a continuing review of the Commission's functions and duties, including those relating to the networks, and will revise, discontinue or adopt fees as the circumstances dictate.

Common Carrier Services

33. Comments in response to the Notice of Proposed Rule Making were received from a number of communications common carriers, including telephone and telegraph carriers, ComSat and organizations providing mobile radio telephone service and paging services or point-to-point microwave communications services. Most of the respondents expressed opposition to the proposed use of a percentage of construction or annual lease costs as a measure of grant fees for facility authorizations. AT&T and other representatives of the telephone industry contend that such costs do not uniformly or accurately reflect "value" to the applicant, as construction costs may vary widely for reasons unassociated with the revenue-producing capacity of the plant being constructed. Added costs of underground or hardened facilities for national security or for protection against natural disasters, and the provision of facilities to very remote locations in the public interest are cited as factors in support of this position. AT&T in its filing also avers that reconciliation of estimated and final costs, as required by the initial proposal, would be difficult and time consuming and would impose substantial additional bookkeeping and accounting burdens on the industry and Commission alike.

34. A number of the miscellaneous common carriers (microwave) and those in the domestic public land mobile radio service also objected to the concept of grant fees based on construction costs, although generally on different grounds. Most of these carriers feel that the construction cost concept would place a much heavier relative financial burden on them than on the conventional telephone and

telegraph carriers, and also discriminates in favor of private radio systems for which no grant fees are proposed. AT&T suggests an alternative plan of relating grant fees to maximum authorized bandwidth for common carrier radio authorizations and to interstate voice channel miles authorized by the grant of applications filed under section 214 of the Act for certificates of public convenience and necessity, and other applications which do not lend themselves to these yardsticks to be charged flat fees. The United Telephone System also recommends that the grant fees be based on a similar concept, suggesting route miles as an appropriate measure.

35. We do not favor authorized bandwidth as a measure of fees for radio services because of inequities which would result from the diverse bandwidth requirements and technical standards of radio services operating in different parts of the spectrum. We do, however, agree that channel miles authorized better signifies "value to the recipient" for authorizations to construct and operate communication channels on wire, cable, microwave, or satellite facilities than does construction cost. Moreover, this approach will simplify determination of correct fees at the time of grant and will eliminate the accounting burden of isolating and reconciling final construction costs with the estimated costs contained in the application. Consequently, the fee schedule has been restructured to delete the proposed use of a percentage of cost as the basis of grant fees for construction applications, with the substitution of communication channel miles as a measure of grant fees for Section 214 facility applications,[11] and the use of flat license fees for

[11] The number of each type of communication channel to be provided and route mileage is now required in Section 214 applications or by § 21.706 of the Rules for those carriers who elect to include a description of the proposed facilities as part of their microwave radio applications, in lieu of filing a separate 214 application. For ease of administration of the fee plan, we would propose to require all carriers to file separate Section 214 applications for authority to channelize microwave routes.

services not conducive to the channel mile treatment, as set forth in the attached schedule.

36. Specifically, the new schedule calls for flat grant fees for construction or modification of base stations in the Domestic Public Land Mobile Radio Service, in lieu of a percentage of construction cost, and also for central office stations in the Rural Radio Service and for point-to-point microwave construction authorizations. In the Satellite Communications Service flat fees are proposed for earth station construction permits and for grants to construct and launch satellites. For common carrier nonradio applications involving construction of cable routes (both landline and overseas) or the establishment of communication channels on existing wire, cable, radio or satellite facilities or the lease of such channels from another carrier, the grant fee is based on the mileage and number of channels authorized, with specific charges per unit for the various categories as specified in the schedule.

37. The flat fees proposed for the public land mobile radio service should serve both to relieve the alleged excessive financial burden on these carriers and reduce the disparity between these common carrier services and private mobile radio systems. A threefold increase in fees for these authorizations is minimal in relation to the 25-fold increase required of common carrier services in total. Likewise, the flat fees now suggested for microwave construction permits will lessen the initial disparity between common carrier and private microwave systems, coupled with the upward adjustment in the filing fee for private systems, as discussed in the Safety and Special Radio Services section of the Report and Order. We do not consider a fee of $200 for common carrier microwave construction permits to be excessive, in light of Commission processing costs and value of the authorization to the applicant, although recognizing that the channel mileage fee will also be applied to those routes, if and when channelized to provide interstate communication services other than video.

Safety and Special Radio Services

38. In the hundreds of comments filed discussing the fees proposed for the Safety and Special Radio Services, the most common objection was that the fees do not reflect the Commission's actual costs of processing these applications. However, as stated in the Notice in this proceeding, the fees we have proposed are designed to cover the entire range of regulatory costs of the Commission and not simply application processing costs in particular services. They also take into consideration value and personal benefit to the recipients of licenses. The fees adopted herein meet these criteria. Thus, while the comments are accurate in suggesting that the fees exceed application processing expenses, there is no merit to any contention that they are excessive, unrelated to the costs of these services, or beyond the scope of our authority.

39. Another contention made by many was that the general public is, in fact, the principal beneficiary of the activities of licensees in the Safety and Special Radio Services and, therefore, the general tax revenues should be used to support at least a part of the Commission's expenses. A variation of this argument presented by some was that it is unfair to raise the fees for most Safety and Special licensees while continuing the fee exemptions for some categories of licensees in these services. In particular, it was urged that the public, through the general tax revenues and not the other Safety and Special licensees, should bear the expenses related to regulating these categories of non-fee-paying licensees. Under the current fee schedule which has been in effect for several years, several categories of licensees have been exempt from fees and propose to continue these exemptions. To a large extent, they cover stations connected with public safety activities, state and local government services, disaster, emergency, and rescue activities, some educational work, regulatory work connected with the compulsory safety at sea program, and beginning Amateur radio operators. We consider these exemptions

appropriate and in the public interest at this time and we note that objections were not directed to the specific exemptions themselves. The objection made reflects the mistaken notion that some licensees will be paying for the regulatory costs of other classes of stations. Our total fee schedule has been adjusted to cover all Commission costs, taking into account the regulatory expenses connected with particular services and also the value of the radio authorization to the licensees. In every instance of the new fees adopted herein for the Safety and Special Radio Services, there is no case where the fee is excessive, unreasonable, or unwarranted when value to the recipient is taken into account along with regulatory costs. Under these circumstances, there is no merit to the contention that some licensees are bearing the expenses of others.

40. Another objection was that the revenues raised through the collection of these proposed fees would exceed the "Bureau's share of the Commission's budget." A short answer to this contention, as more fully set forth in paragraph 4 above, is that there is no requirement in the statute that the "Bureau's share" of fee revenues shall not exceed its share of the Commission's budget or the cost of the Commission's activities involved therein. As set forth above, the Commission's breakdown of activity costs was an important, but not an exclusive, factor in establishing the fee charges adopted herein. However, there is no merit either in fact or in principle to the contention that Safety & Special Service licensees will be subsidizing other services. It has been clear for some years that a major portion of the Commission's fee revenues since the adoption of the fee schedule in 1963, have derived from the Safety & Special Radio Services. But since this apparent disproportion was not based upon discriminatory factors, the validity of the existing schedule has passed the test of judicial review, as cited above. In the same vein, the fee schedule adopted herein is no less valid because the estimated fee revenues from the Safety and Special Radio

Services fall some $93,205 short of the $7,843,500 of Commission costs allocated to such activities.

41. Some concern was expressed that the Safety and Special Radio Services fees will increase in the future if the Commission is to recover its budgetary costs through the assessment of fees. It is reasoned that so long as governmental expenditures rise, the Commission will have to resort to higher fees to remain substantially self-sustaining. In this context, concern was expressed that present and future spectrum management costs would be included in the Safety and Special Radio Services activity costs. In fact, the Safety and Special activity expenses now include its share of spectrum management costs and will continue to do so in the future. If the regional spectrum management project now under development and experimentation is continued and expanded, it may be expected that the costs of this program will be borne by the beneficiaries thereof. In any case, the Commission is obligated to keep the matter of fee schedules under continuing review, and if expenses of regulating these services rise, it may be expected that fee schedules must be adjusted upward.

42. The opinion was expressed by some that the fee to renew a station license should be considerably less than the $19 fee which was set forth in the Notice of Proposed Rule Making as a basic fee for most of the Safety & Special Radio Services. Contrariwise, broadcasting interests noted that the ranks of the land mobile licensees include some of the largest and most profitable corporations; that land mobile users report substantial savings as a direct result of the use of land mobile radio; and that, under these circumstances, land mobile licensees should be required to pay more than the $19 fee. As previously set forth, the standard fee we proposed to establish in the Safety and Special Radio Services reflected the tremendous number of applications received in these services. Further, the benefits and value of a radio license to a Safety and Special Radio

Service licensee is not readily comparable to the benefit and value of a radio licensee to a communications common carrier or to a broadcaster, and the same criteria are not applicable. For most Safety and Special Radio Services licensees, the authorized use of radio facilities is an adjunct to the licensee's principal business or for safety purposes, and the regulatory programs connected with these services are different from those associated with the regulation of the broadcast and common carrier services. However, in order to more equitably distribute respective shares of estimated fee revenues amongst the various services, the fee schedule adopted herein provides for an increase in the basic fee for most Safety and Special Radio Services to $20, as against the $19 previously set forth in the Notice of Proposed Rule Making. As indicated above, this further change will still leave Safety and Special Radio Service's share of fee revenues below the amount of allocated activity costs set forth in paragraph 4 above.

43. Since the proposed fee schedules for the Safety and Special Radio Services were first published in the Notice of Proposed Rule Making, certain changes to Section 1.1115 have been made in response to the comments we have received and as the result of our own further reflection:

(a) The fees we will require of Operational Fixed stations using frequencies above 952 MHz have been raised from $35 to $75. We have reconsidered our original proposal, and feel this increase is warranted in view of the administrative effort devoted to the licensing and regulation of this category of station.

(b) Many amateur radio licensees stated that the basic fee proposed for the Amateur Radio Service ($9) was too high, especially when compared to the fees that must accompany applications for commercial operator's licenses. We believe, however, that this difference can be justified by the difference in the services involved (i.e., the commercial operators' license is necessary to employment as a

commercial operator, while the amateur is essentially a hobbyist, although oftimes performing an important service). We also considered the suggestion that in the Amateur Radio Service there should be an examination fee and a license fee, rather than a single fee for all Amateur applications. We deny this suggestion because of the impracticability of administration.

(c) Another exception to those requests which do not require a fee has been added. A licensee will be permitted to file a request to correct clerical, typographical, and other similar errors made in an application for license, without submitting an accompanying fee, if the request is filed within 60 days of the grant.

(d) A new subparagraph has been added to permit a refund whenever a formal application not required by our Rules is filed by a current licensee in the Safety and Special Radio Services. A typical situation covered by this new provision would be where a corporation files a formal application to change its name without any concurrent change in its corporate structure or ownership, instead of simply notifying the Commission of this change by letter, as permitted by our Rules.

(e) At the present time, our rule covering the Safety and Special Radio Services reads in terms of "formal applications" and except for requests for duplicate licenses, STA's, and waivers, there was no intention to extend the applicability of fees to other than formal applications. Although the word "formal" was left out of our proposal by inadvertence, we are using it again in the rule herein adopted. Otherwise, the rule might be construed to have broader application than intended.

CATV

44. Elsewhere in this Report and Order, we have dealt with such underlying questions as: (i) whether the Commission is legally authorized to establish a fee schedule

which will provide the General Treasury with revenues sufficient to substantially offset the Commission's budgeted expenditures; (ii) whether, in particular, the CATV schedule is unfair as a whole either because (as some CATV parties allege) CATV regulation is primarily for the benefit of the television broadcast industry, and the latter industry should bear the costs, or because (as some broadcast parties allege) the schedule fails to anticipate a rapid proliferation of CATV throughout the country accompanied by accelerating regulatory costs; and (iii) whether CATV operation may be viewed as a Federally licensed activity with respect to which the Commission may charge an annual fee.

45. Having already treated these and other broad questions of regulatory-agency-fee law and policy, we may now approach the particulars of the CATV fee schedule, and test each of the items therein with the simple question, "Is it fair?" We have modified somewhat the originally proposed CATV fee-schedule revision (as set forth in the Notice of Proposed Rule Making in this proceeding) in the light of that question and the comments which have been filed.

46. In view of the administrative burden entailed by petitions for special relief filed under Section 74.1109 of the Rules, we originally proposed a filing fee of $300 per petitioner. That fee has now been reduced to $25 per petition —in recognition of the fact that such petitions often draw the Commission's attention to situations in which the public interest would be disserved by routine application of the rules, and that parties considering the filing of such a petition should not be confronted with fees so high as to discourage them from doing so. The CARS $15 license application fee item has been corrected to make it clear that, as intended from the outset, the fee is for both new-license and license-renewal applications; the absence of a CARS license-renewal fee would be unjustifiably inconsistent with

the schedule's provisions with respect to other licensed services. For the same reason, we have removed the annual-fee exemption originally proposed for CATV systems with 200 or fewer subscribers.

47. The 30-cents-per-subscriber-annual-fee formula has been attacked on diverse grounds; that it fails to take into consideration that different systems charge different subscription rates; that operating costs vary even when subscription rates are the same; that in some cases local franchise agreements bar systems from passing increased costs on to subscribers via rate increases; and that the 30-cents-per-subscriber fee would cut sharply into narrow profit margins.

48. The very diversity of these criticisms (which were not accompanied by specific supporting data) suggests that it would be exceedingly difficult to devise a formula that would be proof against all attack. In defense of the formula adopted, we would note: (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year thus appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of the fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual reporting by CATV systems; and, finally, (v) that as the Commission obtains such information it will use it for periodic review of the equity of its CATV fee schedule.

49. The annual fee is payable on April 1 of each year for the preceding calendar year or part thereof.[12] It is computed on the basis of thirty cents times the number of subscribers during the calendar year. The number of subscribers is determined by averaging the number of subscribers on the last day of each quarter of the calendar year. The fee for periods less than a calendar year is the annual fee pro-rated by the number of full months covered.

Equipment Testing and Approval

50. Many comments indicated that there was no objection to the establishment of a fee schedule for equipment approval actions which was fair and equitable and recovered an amount approximating necessary expenses of the Office of Chief Engineer. However, there was strong opposition to the concept of a grant fee the computation of which was based on the manufacturer's selling price and the number of units of the particular type of equipment produced. It was stated that the "manufacturer's selling price" was not a term of art uniformly defined by all manufacturers and that the use of production figures could involve the disclosure of information which has always been regarded by the industry as confidential. In addition, it was alleged that a projection of fee revenues made by industry members under the formulas originally proposed would produce a return for in excess of the allocated cost of equipment approval activities as set forth in our Supplemental Notice and, indeed, much beyond the Commission's announced goal.

51. Our re-examination of this subject has led us to markedly revise the schedule of fees for equipment approval actions. In lieu of the formula previously set forth, the fee schedule adopted herein provides for a flat filing fee ranging from $5 to $200, as well as a flat grant fee rang-

[12] The date of filing of the annual financial report, if required (See Docket 18397) will be coordinated with the fee payment date.

ing from $15 to $800 for each model or type of equipment covered by the Commission's equipment approval action. As set forth in our rules, application filing fees must accompany each application for equipment approval action.[13] Our past experiences in equipment approval activities indicate some 1800 separate approval actions, many of which cover several models or types of the basic equipment. This is a new area for the Commission's fee schedule and we do not yet have the experience or the information which permits the adoption of a more refined schedule of fees, which would more accurately and precisely reflect the "value to recipient" factor, a fundamental aspect of the Commission's new fee schedule. We believe, however, that the simplified schedule adopted herein, which reflects primarily the cost to the government, is generally fair and equitable and emphasizes the factor of simplicity from the standpoint of the industry affected.

52. Some comments, notably from aviation interests and others manufacturing equipment for government, military or foreign entities, or for emergency services, urged exemption from the fee schedule of those categories of equipment. Additionally, a number of comments suggested that consideration be given for those equipments used in serving the general public, e.g., navigation aids, etc. These comments mistake, however, the thrust of the Commission's fee schedule in this area. Fees are being established in connection with the Commission's equipment approval action without regard to the type of equipment involved. If the particular equipment is required by any other rule or stat-

[13] Our proposed revision in procedures, announced in connection with our rules adopted under Section 302 of the Act, look to a clearly defined two-step procedure of application filing and subsequent action on such applications, but is not yet completed. The application filing fee for equipment certification should accompany the certificate filed by the manufacturer and the grant fees will be payable upon Commission acknowledgment and approval.

ute to be approved in connection with its shipment, sale or use, then a fee is properly chargeable for the work and benefit involved in such action. The important factor is the necessity or desirability of equipment approval action and not in the ultimate purpose or destination of such equipment.

53. One other comment indicated that since certain industrial heating equipment might not include conventional receivers or transmitters, it should not be subject to fees. This contention, too, is beside the point. Fees have been established to cover the work and benefit involved in equipment approval actions regardless of the type of equipment in question. If equipment approval action is requested and obtained, the fees set forth in the schedule adopted will be payable.

Commercial Radio Operator Licenses and Examinations

54. The present fee schedule relating to commercial radio operators encompasses one fee to cover both the application to take radio operator examinations and the subsequent issuance of a license. The schedule adopted herein makes no change in this approach. While new fees are established for applications for verification cards and posting statements, no increase is made in existing fees except for the issuance of restricted radio telephone permits. This increase is based in part on the fact that commercial radio operator licenses are normally issued for a period of five years, while restricted radio telephone permits are valid for the lifetime of the holder. However, the proposed increase to $10.00 set forth in the Notice has been reduced to $8.00. While the tremendous number of applications for such permits in the past would, if maintained, produce fee revenues markedly in excess of Commission costs allocated to operator licensing activities, it is anticipated that the fee increase will operate to decrease the number of such applications. That, too, is a Commission objective since it ap-

pears that such permits have been obtained and used by holders for other than communications purposes.

55. Comments directed to the increase in fees for the restricted radio operator permit claimed that such increase was unreasonable, prohibitive, discriminatory or would affect "the safety offered by the shipboard radio installations." It is unlikely, however, that safety of shipboard radio installations could be affected by increasing the fee since the increase should not deter applicants for a lifetime permit who require it to operate shipboard radios.

56. One comment suggested that renewals of First and Second Class licenses be nullified in order to reduce workload. Upon examination of this proposal, the Commission has determined it is necessary to provide for renewal of such licenses in order to maintain administrative control, particularly in cases where behavior by the operator warrants consideration by the Commission as to whether the license should be renewed.

57. Authority for the adoption of the amendments herein is contained in Section 4(i) (47 U.S.C. § 154(i)) of the Communications Act, Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 483(a)), and Budget Bureau Circular A-25 and supplements thereto.

58. This proceeding is hereby terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Subpart G, Part 1 of Chapter I, Title 47 of the Code of Federal Regulations is revised to read as follows:

SUBPART G—SCHEDULE OF FEES FILED WITH THE COMMISSION

Authority: §§ 1.1101-1.1120 issued under sec. 501, 65 Stat. 290; 31 U.S.C. 483a

General Information

§ 1.1101 Authority.

Authority for this Subpart is contained in Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) which provides that any service rendered by a Federal agency to or for any person shall be performed on a selfsustaining basis to the fullest extent possible. Title V further provides that the head of each Federal agency is authorized by regulation to prescribe such fees as he shall determine to be fair and equitable.

§ 1.1102 Payment of fees.

(a) *Filing fees.* Each application or notification by a CATV system under § 74.105 filed on or after August 1, 1970, for which a fee is prescribed in this subpart, must be accompanied by a remittance in the full amount of the fee. In no case will an application or other filing be accepted for filing or processed prior to payment of the full amount specified. Filings for which no remittance is received, or for which an insufficient amount is received, may be returned to the applicant. In the case of multiple applications for which a single check is drawn to cover all fees for the applications, it would be of great assistance to the Commission if a transmittal letter or notice were attached stating what fees are covered by the check.

(b) *Grant fees.* Grant fees should be accompanied by a transmittal advice identifying the purpose of the check.

A copy of the Commission's notice of grant, which will specify the amount of the fee, will suffice.

(1) Where a grant fee is prescribed in the various services, the fee will be payable within 45 days after grant by the Commission. In the broadcast services, the grant fee, based on a percentage of the consideration, in assignment and transfer cases must be *transmitted* by the new licensee immediately following consummation of the transfer or assignment.

(c) *Annual fees.* The annual fee prescribed for broadcast stations must be submitted each year on or before the anniversary date of the expiration date of the station's license. The licensee shall file the station's rate card as of the preceding June 1 together with the amount of the annual fee. A new station first becomes liable for the annual operating fee at the time program test authority is granted. In the first year, the fee will cover the period from the date of program test authority until the next payment date (Example, if a station is in operation for seven full months prior to the next payment date, the fee is $\frac{7}{12}$ of the annual rate).

(1) If a station has filed an application for renewal of a station license that will expire after July 31, 1970, any filing fee paid with the renewal application will be credited against the initial annual operating fee. Licensees should note that they are claiming this credit at the time they submit their rate card and pay their first annual operating fee.

(2) The annual fee prescribed for CATV systems must be submitted by April 1 for the preceding calendar year. A new CATV system becomes liable for the annual operating fee as of the date it begins to charge for service to 50 subscribers or more. In the first year of operation of the system, the fee will be computed based on the average of the number of subscribers being served on the last day of each full quarter of operation up to the end of the calendar

year (Example, if a system is in operation on the last day of three quarters prior to the end of the calendar year, the average of those three last-day figures is to be used in computing the fee required). The fee will cover the number of full months of operation until the end of the calendar year, (Example, if a system is in operation for seven full months prior to the end of the calendar year, the fee is 7/12 of the annual rate).

(d) Fee payments received in the Commission's Offices in Washington, D. C., or in any of the Commission's field offices, should be in the form of a check or money order payable to the Federal Communications Commission. The Commission will not be responsible for cash sent through the mails. All fees collected will be paid into the United States Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483a).

(e) Receipts will be furnished upon request in the case of payments made in person, but no receipts will be issued for payments sent through the mails.

(f) Except as provided in §§ 1.1103 and 1.1104, all fees will be charged irrespective of the Commission's disposition of the application. Applications returned to applicants for additional information or corrections will not require an additional fee when resubmitted.

§ 1.1103 Return or refund of fees.

(a) The full amount of any fee submitted will be returned or refunded, as appropriate, in the following instances:

(1) Where no fee is required for the application filed.

(2) Where the application is filed by an applicant who cannot fulfill a prescribed age requirement.

(3) Where the application is filed for renewal without the reexamination of an amateur or commercial radio operator license after the grace period has expired.

(4) Where the applicant is precluded from obtaining a license by the provisions of section 303(1) or 310(a) of the Communications Act.

(4) Where circumstances beyond the control of the applicant, arising after the application is filed, would render a grant useless.

(6) When applications (accompanied by fees) are filed where not actually required by Safety and Special Radio Service rules (e.g., change of address, pro forma change of corporate name, etc.).

(7) When construction permit holders and licensees make non-substantive corrections in license grants within a period of 60 days from grant.

(b) Payments in excess of an applicable fee will be refunded only if the overpayment exceeds $2.00.

§ 1.1104 General exceptions.

(a) No fee is required for an application filed for the sole purpose of amending an authorization or pending application (if a fee is otherwise required) so as to comply with new or additional requirements of the Commission's rules or the rules of another Federal government agency affecting the authorization or pending application; however, if the applicant also requests an additional modification or the renewal of his authorization, the appropriate modification or renewal fee must accompany the application. Fee exemptions arising out of this general exception will be announced to the public in the orders amending the rules or in other appropriate Commission notices.

(b) No fee is required for an application filed by an alien pursuant to a reciprocal radio licensing agreement.

§ 1.1105 General Rule.

No filing fee is required for any application or request for special temporary authority (STA) or waiver in any service or for the grant of a STA or waiver of brief duration or minor character. Upon grant of an application or request for STA of an important character, the appli-

cant will be notified to remit a fee in the following amount for the respective services.

Broadcast Services	$25.00
Common Carrier Services	25.00
Safety and Special Radio	5.00
Community Antenna TV	25.00

(a) Except as provided in paragraph (b) of this section, the fees prescribed below are applicable to applications and operations in the Radio Broadcast Services:

Construction Permits

Application for construction permit for new station or for major changes in existing station:

	Filing fee	Grant fee
VHF—top 50 markets [1]	$5,000	$45,000
UHF—top 50 markets	2,500	22,500
VHF—next 50 markets	2,000	18,000
UHF—next 50 markets	1,000	9,000
VHF—balance	1,000	9,000
UHF—balance	500	4,500
FM—class A	100	900
FM—class B and C	200	1,800
AM—day-50 kw	500	4,500
AM—day-25 kw	400	3,600
AM—day-10 kw	300	2,700
AM—day-5 kw	200	1,800
AM—day-1 kw	100	900
AM—day-1 kw	50	450
AM—day-250 w [2]	25	225
AM—unlimited 50 kw	1,000	9,000
AM—unlimited 25 kw	800	7,200
AM—unlimited 10 kw	600	5,400
AM—unlimited 5 kw	400	3,600
AM—unlimited 1 kw	200	1,800
AM—unlimited 500 w	100	900
AM—unlimited 250 w [2]	50	450
AM—class IV	100	900
For directional antenna in addition to the above	50	450

[1] The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year year.

[2] The fee for major changes in 100-w. operations is the same as for 250-w. operations.

Other Applications

The following fees shall accompany each application:

	AM	FM	TV	*Auxiliary* [1]
Applications filed on FCC Form 316 (where more than one broadcast station license is involved, the application must be accompanied by the total amount of the fees prescribed for each license so involved)	$250	$250	$250	No fee.
Application for construction permit to replace expired permit, FCC Form 321.[2]	500	500	500	$50.
Application for modification other than a major change	50	50	50	
Application for change of call sign for broadcast station	100	100	100	
All other applications in the broadcast services	50	50	50	

[1] With respect to applications for remote pickup broadcast stations authorized under subpart D of part 74 of this chapter, one fee will cover the base station (if any) and all the remote pickup mobile stations of a main station, provided the applications therefore are filed at the same time.

[2] The $500 fee applies to construction permits for new stations or major changes in existing stations. An application to replace a construction permit for a modification other than a major change must be accompanied by a fee of $50 in all services.

Subscription Television

Application for Subscription Television Authorizations:

Applicant Filing Fee $1,000

Assignments and Transfers

Application for assignment of license or transfer of control, exclusive of FCC Form 316 applications (where more than one broadcast station license is involved, the total amount of fees prescribed for each license so involved will be paid in the manner set forth below):

Application Filing Fee ..... $1,000.

Assignment and Transfer fee to be paid immediately following consummation of the assignment of transfer. 2% of consideration for assignment or transfer.

Annual License Fees

Each broadcast station shall pay an annual license fee to the Commission that is based on the station's rate card as of June 1 of each year,[1]

For AM and FM radio stations:

The annual fee will be a payment equal to 24 times the station's highest single "one-minute" spot announcement rate, but in no event shall the annual payment for each AM and each FM station be less than $52.00;

For television broadcast stations:

The annual fee will be a payment equal to 12 times the station's highest "30-second" spot announcement rate, but in no event shall the annual payment be less than $144.00.

(b) Fees are not required in the following instances:

(1) Applications filed by tax exempt organizations for the operation of stations providing noncommercial educational broadcast services, whether or not such stations operate on frequencies allocated for noncommercial educational use.

(2) Applications in the Am Service requesting only authority to determine antenna power by direct measurement.

(3) All television translator applications.

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[1] In the first year of this fee schedule, a station's fee will be computed by taking the number of months from the effective date to the payment date divided by 12 times the full year annual fee. Stations beginning operation, pursuant to program test authority, after the license expiration anniversary date are liable for a pro-rata amount of the annual fee equal to the number of full months in operation from the date of program test authority to the payment date for the short period.

§ 1.1113 Schedule of fees for Common Carrier Services

Application filed for Common Carrier Services shall be accompanied by the fees prescribed below:

Domestic public land mobile radio service [1]	*Filing fee*	*Grant fee*
Application for initial construction permit or for relocation of a base station, including authority for mobile units, blanket dispatch station authority,[2] and standby transmitters without independent radiating systems.[3] [4]	$100	$150.
Application for initial construction permit or for relocation of a dispatch station,[5] control station or repeater station.[4]	50	$75.
Application for modification of construction permit or license for base station, dispatch station, control station or repeater station at an existing station location.	25	$50.
Application for renewal of license for base station.	25	$125.
Application for renewal of license for dispatch station, control station or repeater station.	10	$50.
Application for license, modification of license, or renewal of license for individual mobile stations per mobile unit.	50	None.
Rural radio service		
Application for an initial construction permit or for relocation of facilities—central office.[4]	100	$100.
Application for modification of construction permit or license—central office.	25	$50.
Application for license for operation of a rural subscriber station at temporary-fixed locations.	10	$20.
Application for license or modification of license for individual subscriber stations.	5	$20.

	Filing fee	Grant fee
Application for renewal of license rural subscriber station.	25	None.
Application for renewal of license central office station.	125	Do.
Point to point microwave radio services		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to existing points of communication or for relocation of facilities.[4 6]	50	$150.
Application for license for operation of a station at temporary-fixed locations.	50	$100.
Application for modification of construction permit or license.	50	$150.
Application for renewal of license.	25	$100.
Local television transmission service		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to an existing station location or for relocation of facilities.[4]	50	$150.
Application for license for operation of an STL station at temporary-fixed locations.	50	$100.
Application for license for operation of a mobile television pickup station.	50	$100.
Application for modification of license.	25	$75.
Application for renewal of license.	25	$50.
International fixed public radiocommunication services		
International fixed public station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[4]	150	$500.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be		

	Filing fee	Grant fee
charged for application for modification of license to delete transmitter(s) being replaced if both applications are filed simultaneously).	75	$100.
Application for change of location of an authorized station.	150	$400.
Application for modification of license.	25	$100.
Application for renewal of license.	100	$200.
International control station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[4]	100	$400.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter being replaced if both applications are filed simultaneously).	50	$250.
Application for change of location of an authorized station.	100	$400.
Application for modification of license.	25	$100.
Application for renewal of license.	50	$100.
Other radio applications		
Application for assignment of an authorization or transfer of control (a separate fee is required for each call sign covered by the application).	10	$50.
All other common carrier radio application).	25	None.
Satellite communications services		
Application for initial construction permit for earth station.	500	$50,000.
Application for modification of construction permit for earth station.	200	$2,000.
Application for renewal of license—earth station.	100	$400.

	Filing fee	*Grant fee*
Application for authority to construct and launch satellites.	500	$100,000.
Application for assignment of an earth station construction permit or license or transfer of control of a licensee or permittee.	100	$200.
Application for communications common carriers for authorization to own stock in the Communications Satellite Corp.	25	$50.
Any other application filed under the Communications Satellite Act.	25	$50.
Common carrier nonradio applications		
Section 214 application for construction of landline coaxial cable.	100	$5 per route mile.
Section 214 applications to extend or supplement facilities by construction of voice cables or installation of carrier equipment on landline wire, cable or radio routes.	50	$6 per 1,000 equivalent 4 KHz channel miles authorized or fraction thereof.
Section 214 applications to lease facilities from other carriers (except overseas).	25	$4 per 1,000 equivalent 4 KHz channel miles authorized or fraction thereof.
Section 214 applications for overseas cable construction.	1,000	$50 per route mile (nautical).
Section 214 applications to establish communication channels on overseas cables.	50	$10 per 1,000 equivalent 3 KHz channel miles authorized or fraction thereof.
Section 214 applications to lease overseas cable channels.	50	$6 per 1,000 equivalent 3 KHz channel miles authorized or fraction thereof.
Section 214 applications to establish and operate satellite channels.	100	$30 per equivalent 4 KHz channel.
Section 214 applications to lease satellite channels.	50	$20 per equivalent 4 KHz channel.
Section 214 applications to discontinue, reduce or impair service to the public:		
Telephone companies.	50	$50.
Telegraph companies.	10	$15.
Cable license.	100	$100.
Interlocking directorate applications.	10	$40.

	Filing fee	*Grant fee*
Section 221 applications.	10	$250.
Tariff applications to change charges or regulations on less than statutory notice.	25	None.
All other common carrier nonradio applications.	25	Do.

1 In this service each transmitter at a fixed location is a separate station notwithstanding the inclusion of more than one such station on a single authorization or under a single call sign.

2 When included as part of a base station application, a request for blanket dispatch station authority made pursuant to the provisions of sec. 21.519(a) of this chapter does not require an individual application or fee. A request for such dispatch station authority filed separately from a base construction permit application requires an application for modification of license and an appropriate fee.

3 An application for a standby transmitter having its own independent radiating system requires the same fee as a base station application.

4 No additional fee will be charged for applications for licenses to cover a construction permit unless there is a modification or variation of outstanding authority involved. In that event the appropriate fee for modification is applicable.

5 This fee applies to any request for dispatch station authority not made pursuant to sec. 21.519(a) of this chapter.

6 For applicants who propose to multiplex their radio systems and who make the supplementary showing required by sec. 21.706 of the rules in the lead application in lieu of filing a separate application under sec. 214 of the act, an additional grant fee will be payable at the rate of $6 per 1,000 equivalent 4 KHz channel miles, as prescribed in the schedule for sec. 214 applications to extend or supplement facilities.

§ 1.1115 Schedule of fees for the Safety and Special Radio Services.

(a) Except as provided in paragraph (c) of this section, the fees set forth in the schedule below shall accompany all formal applications for authorizations filed in the Safety and Special Radio Services:

Applications for all authorizations except as noted below $20

Interim ship license including subsequent initial license 25

Operational fixed stations using frequencies above 952 MHz:

Initial license and renewal	75
Assignment of license	75

Common Carrier Public Coast Stations:

Initial license and renewal	75
Assignment of license	75

Amateur Service:

Initial license, renewal and new class of operator license	9
Modification of license without renewal	4
Modification of license with renewal	9
Special Call Sign (plus other applicable fee)	25

(b) Except is provided in paragraph (c) of this section, the fees set forth below shall accompany the following applications or requests filed in the Safety and Special Radio Services:

Duplicate license	6

(c) *Fees are not required in the following instance:*

(1) Applications filed in the Police, Fire, Forestry-Conservation, Highway Maintenance, Local Government, and State Guard Radio Services.

(2) Applications filed by governmental entities in any of the Safety and Special Radio Services.

(3) Applications filed by the following in the Special Emergency Radio Service: Hospitals, Disaster Relief Organizations, Beach Patrols, School Buses, and non-profit Ambulance Operators and Rescue Organizations.

(4) Applications filed in the Disaster Communications Service.

(5) Applications for ship inspections pursuant to the Great Lakes Agreement, the Safety of Life at Sea

Convention, and Parts II and III, Title III, of the Communications Act of 1934, as amended.

(6) Applications for Novice Class license in the Amateur Radio Service, applications for amateur stations under military auspices, and applications filed in the Radio Amateur Civil Emergency Services (RACES).

(7) Operational Fixed Microwave Applications filed for Closed Circuit Educational Television Service.

(8) Applications for Civil Air Patrol Stations, Aeronautical Radionavigation Stations and for Aeronautical Search and Rescue Stations.

§ 1.1116 Schedule of fees for Cable Television Services.

(a) Applications, notifications and petitions filed in the Cable Television Services shall be accompanied by the fees prescribed below:

Applications in the Community Antenna Relay Service (CARS)

For a construction permit	$50
For a license or renewal	15
For a modification of construction permit or license	15

Petitions

For special relief (other than that specified below), pursuant to § 74.1109	25
For experimental operations pursuant to paragraph 51 of the December 1968 *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397* (see, also, proposed § 74.1107(b) and (c) in Appendix C of that *Notice*)	25
For waiver of hearing re carriage of distant signals within the Grade A contour of a television broadcast station in a top-100 market:	

Per proposed commercial (a) VHF station or (b) network-affiliated UHF station, distant signal	25
Per proposed (a) educational station, or (b) independent UHF station, distant signal	10
Notifications pursuant to § 74.1105	10

(b) An annual fee shall be paid by each CATV system on or before April 1 of each year for the preceding calendar year. The fee for each system shall be equal to the number of its subscribers times 30¢. The number of subscribers shall be determined by averaging the number of subscribers on the last day of each calendar quarter. (See § 1.1102(c)(2).)

Note: Where a system offers bulk rates to multiple-outlet subscribers, such as apartment house or motel operators, such contracts are not viewed as individual subscriptions for purposes of fee determination. Rather, each such contract is viewed as a number of subscriptions, such number to be calculated by dividing the total annual-charge for that bulk-rate contract by the system's basic annual subscription rate for an individual household. (Thus, for example, if a CATV system charges an apartment house operator $1000 a year for a bulk rate contract and charges individual households a basic rate of $50 per year, the bulk rate contract is counted as 20 subscriptions (i.e., 1000÷50=20).) It is not contemplated, however, that such calculations should be made with respect to extra payments for additional CATV outlets within the same individual household.

§ 1.1117 Schedule of fees for commercial radio operator examinations and licensing.

(a) Except as provided in paragraph (b) of this section, applications filed for commercial radio operator examinations and licensing shall be accompanied by the fees prescribed below:

Applications for operator license:

First class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$5.00
Second class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$4.00
Third class permit, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$3.00
Provisions radiotelephone third-class operator certificate with broadcast endorsement—1 year term	$2.00
Restricted radiotelephone permit, new, duplicate or replacement	$8.00
Restricted radiotelephone permit (alien)—1 year term	$2.00
Application for endorsement of license	$2.00
Application for verification card (FCC Form 758-F)	$2.00
Application for posting statement (FCC Form 759)	$2.00

(b) Whenever an application requests both an operator license and an endorsement, the required fee will be the fee prescribed for the license document involved.

§ 1.1119 Experimental Radio Services (other than Broadcast).

Fees are not required in the case of applications filed in the Experimental Radio Services (other than Broadcast).

§ 1.1120 Schedule of fees for equipment approval, acceptance or certification.

Type approval, type acceptance, certification or approval of subscription television systems shall require payment of fees as prescribed below.

Item	*Filing fee*	*Grant fee*
1. Application for certification of each receiver model: [1]		
(a) Television receivers	$10	$40
(b) FM receivers	10	30
(c) All others	10	25
2. Application for prototype certification of equipment operating under part 18	5	20
3. Request for modification of a certificated receiver with no change in model number: [2]		
(a) Television receivers	10	30
(b) FM receivers	5	20
(c) All others	5	20
4. Request for modification of a prototype certificated equipment operating under part 18 with no change in model number[1 2]	5	15
TYPE ACCEPTANCE		
1. Application for type acceptance of each equipment type[3 4]	25	75
2. Application for the addition of one or more radio services to existing type acceptance for each equipment type as identified by manufacturer (or trade name) and type number	25	75
3. Approval of subscription television system	200	800
TYPE APPROVAL		
1. Application or submission for type approval: [5]		
(a) Part 73		
(1) Broadcast modulation monitors—SCA and stereo	100	400
(2) Broadcast modulation monitors—other	50	200
(2) Broadcast modulation monitors—other	50	200
(3) Other broadcasting equipment	50	200
(b) Part 81		
(1) Ship transmitters including lifeboat transmitters	25	125
(2) Ship radar	25	75
(3) Ship automatic alarm systems)	50	200

Item	Filing fee	Grant fee
(4) Ship alarm automatic keyers	25	75
(5) Other maritime devices	50	150
(c) Part 15		
(1) Wireless microphones	25	125
(2) Other low-power devices	25	75
(d) Part 18		
(1) Medical diathermy	100	400
(2) Epilators	100	400
(3) Microwave ovens	200	800
(4) Medical ultrasonic	50	200
(5) Industrial ultrasonic	50	200
(6) Other ISM devices	50	200
2. Applications for modification of existing type approved equipment: [6]		
(a) Modifications which require retesting:		
(1) Part 73 and 18	50	200
(2) Part 15 and 81	25	75
(b) All other modifications	10	40

[1] A filing fee must be paid for each receiver which is part of a transceiver model or of equipment in which one or more receivers and transmitters are packaged as an individual unit and identified by a common equipment model number. The certification and accompanying fee must be submitted at the same time as applications for type acceptance of the associated transmitter(s) is made.

[2] A request for modification of a certificated equipment which involves a change in type (or model) number will be considered as an application for a new certification under items 3 and 4 of the schedule.

[3] Application for type acceptance of equipments which bear different identification will be considered separate applications, regardless of whether such equipments may be otherwise identical.

[4] Fees for type acceptance are not required in the following cases:

(a) When a request for type acceptance is included in an application for station license and covers only the item of equipment to be authorized in that particular station;

(b) When a request is made by the licensee of a station for approval of modifications to a specific item or items of existing type accepted equipment authorized in that particular station.

[5] Application for type approval of equipments which bear different identification will be considered separate applications, regardless of whether such equipments may be otherwise identical.

[6] A request for modification of a type approved equipment which involves a change in type (or model) number will be considered as an application for a new type approval under item 1 of the schedule.

Certification

STATEMENT OF COMMISSIONER KENNETH A. COX CONCURRING IN PART AND DISSENTING IN PART

I dissent with respect to the annual fees for broadcast stations. I would have exempted certain small stations from such fees. I concur in all the rest of the document.

[Caption Omitted in Printing]

March 5, 1971.

THE COMMISSION, BY COMMISSIONERS BURCH (CHAIRMAN), BARTLEY, ROBERT E. LEE, JOHNSON, H. REX LEE, WELLS, AND HOUSER, ISSUED THE FOLLOWING PUBLIC NOTICE:

DEADLINE FOR FILING *CATV* ANNUAL FEE EXTENDED TO MAY 1, 1971; REQUIRED COMPUTATION FORM AVAILABLE

Sections 1.1102(c)(2) and 1.1116(b) of the Commission's Rules provide, in pertinent part, that CATV systems are required to pay an annual fee of 30 cents per subscriber on or before April 1 for the preceding calendar year. Many questions have arisen concerning the method of calculation of this fee during its first year of application. Accordingly, a CATV Annual Fee Computation Form (FCC Form 326-A) has been prepared to simplify calculations of the appropriate fee for each CATV system, and is now available from the Commission. In addition, the Commission has decided to extend the time for filing the CATV annual fee due for the 1970 calendar year to May 1, 1971.

Since Commission CATV records are kept on a community basis, a separate FCC Form 326-A, with payment attached, must be filed for each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by CATV facilities, even if there is a single head end and identical ownership of facilities extending into several communities. Fees should be paid by check or money order payable to the Federal Com-

munications Commission. (Cash or stamps should *not* be sent.)

Copies of FCC Form 326-A will be sent to all known CATV system owners or operators.

Action by the Commissioner March 3, 1971. Commissioners Burch (Chairman), Bartley, Robert Lee, Johnson, H. Rex Lee, Wlls and Houser.

F.C.C. 71-311

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 18802

In the Matter of

AMENDMENT OF SUBPART G OF PART I OF THE COMMISSION'S RULES RELATING TO THE SCHEDULE OF FEES

Memorandum Opinion and Order

(Adopted March 24, 1971; Released April 1, 1971)

BY THE COMMISSION: COMMISSIONER JOHNSON concurring in the result; COMMISSIONER HOUSER not participating.

1. The Commission has before it a number of Petitions for Reconsideration concerning various aspects of its fee schedule adopted July 1, 1970, with an effective date of August 1, 1970. (Report and Order, 23 F.C.C. 2d 880; 35 Fed. Reg. 10988).[1] In addition, there have been submitted

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[1] Law Offices of Arthur Stambler, Law Offices of Morgan, Lewis and Bockius Lunde Corp., Bret Broadcasting Corp., et al., Steuben Broadcasters, Inc., et al., Radio Hopewell, Inc., Clay Broadcasting Corp. (Texas) et al., Mid-America Media, Inc., et al., Storer Broadcasting Co., National Assoc. of Broadcasters, Joint Petition-Cole, Zylstra & Raywid, American Radio Relay League, California Citizens Band Assoc., Redwood Citizens Banders, Inc., Special Industrial Radio Service Assoc., Inc., Electronic Marine Products

to the Commission a request for a Declaratory Ruling,[2] a request for further review of certain aspects of the new fee schedule,[3] and a multitude of correspondence in the months since July 1 relating to individual items in the fee schedule as adopted, as well as to the general approach taken toward the different services. The Commission has reviewed fully all of the matters raised, both explicitly and implicitly, in the many submissions by these interested persons and the following paragraphs reflect our consideration of the various categories of questions raised. However, while all of the matters raised have been fully considered, we have not attempted to address ourselves to each and every comment and our treatment of these questions by categories encompasses consideration of all of the individual variations set forth in the separate comments.

2. Questions have been raised as to the legality and propriety of the fee schedule adopted by us, based on various contentions: that the fees set forth amount to taxation;

Chicago Area Radio Club Council Inc., RCA Global Communications, Inc., National Broadcasting Co., Inc., Communications Satellite Corp., Joint Petition-Twenty Miscellaneous Common Carriers, United States Independent Telephone Assoc., American Trucking Assoc., Inc., et al., West Texas Microwave Co., Law Offices of Wheeler & Wheeler, Oklahoma Broadcasters Assoc., the PHD Amateur Radio Assoc., Inc., and R. G. Galbraith, et al.

[2] Jointly filed by CBS TV Network Affiliates Assoc., NBC TV Network Affiliates Assoc., and ABC TV Network Affiliates Assoc. West Texas Microwave Co., Law Offices of Wheeler & Wheeler, and Oklahoma Broadcasters Assoc.

[3] The Oklahoma comments were filed on July 10, 1970. The comments were received too late for consideration before adoption. Since the comments raised were similar to those raised in the petitions for reconsideration, the Commission has included the pleadings in the scope of this Order. Additionally, a *Supplement to Joint Petition for Reconsideration of Increase in Common Carrier Fee Schedule* was filed by United Video, Inc., and several other communications have been received from individual members of the public.

that the Commission is not required to collect, by way of fees, its entire budget; that to establish such fees, the Commission improperly relied on only one criterion—value to the recipient; and that the activity costs set forth in the Report and Order are at variance with those supplied by the Commission to the Congress. While these comments present no new information or evidence which has not been considered by the Commission in connection with the adoption of the fee schedule on July 1, 1970, it may be useful to summarize briefly the legal basis and approach underlying the adoption of our fee schedule.

Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. § 483(a)) provides that "any work . . . benefit, privilege, authority . . . franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared or issued by any Federal agency . . . shall be self-sustaining to the full extent possible and . . . each federal agency is authorized by regulation . . . to prescribe therefor such fee, charge or price . . . as [it] shall determine, . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served and other pertinent facts, . . . ". After the authority of the Commission to establish fees in accordance with these statutory provisions was judicially upheld (*Aeronautical Radio, Inc.* v. *F.C.C.*, 335 F.2d 304; *cert. den.* 379 U.S. 966), the then Bureau of the Budget regularly urged the establishment of higher fee schedules and the Congress called upon the Commission, in connection with its appropriations for fiscal year 1970, to increase its fees "to fully support all of its activities." (R. Rep. 91-316, June 19, 1969, pp. 7-8; Committee of Conference, H. Rep. 91-649, Nov. 18, 1969, p. 6). Both Houses of Congress have reiterated these views in connection with their separate consideration of the Commission's appropriation for fiscal year 1971. (H. Rep. 91-1060, May 7, 1970; p. 5; Sen. Rep. 91-949, June 24, 1970, p. 5). In arriving at the new sched-

ule of charges, the Commission has given considerable but not exclusive consideration to its allocation of costs of Commission activities, as described in its Supplemental Notice in this Docket issued on March 4, 1970. This breakdown of activity costs is obviously not on all fours with that set forth in our budget request to the Congress since, for purposes of the fee schedule, the costs of overhead and support activities were broken down on a prorated basis and allocated to the bureaus whose activities are directly the subject of fees. Paragraph 4 of our previous Report and Order fully sets forth this approach and shows the relationship between Commission costs and projected fee revenues. When viewed in this light, it seems clear that the charges established in our fee schedule are clearly legal and within our authority to establish.

Effective Date of New Fee Schedule

3. Numerous questions have been raised concerning the effective date of the new fee schedule and its overall impact. The fee schedule adopted on July 1, 1970, was made effective as of August 1, 1970. Consequently, applications received by the Commission on or after August 1, 1970, are subject to the new schedule of application filing fees, and grants made by the Commission on and after August 1, 1970, are, except as noted below, also subject to the new schedule of grant fees. The Report and Order establishing the new fee schedule was adopted on July 1, 1970, and released and generally published on July 2, 1970, although it was not printed in the Federal Register until July 8, 1970. However, in accordance with the provisions of Section 4(c) of the Administrative Procedure Act, 5 U.S.C. 553(d), paragraph 10 of the Report and Order sets forth in some detail the reasons why the fee schedule was being made effective as of August 1, 1970, less than 30 days after its publication in the Federal Register. We believe that this action is in compliance with the provisions of applicable law and should remain undisturbed.

4. While making the new fee schedule effective as of August 1, 1970, we determined to exempt grants made on or after August 1, 1970, if the application for such grant had been filed with the Commission prior to July 1, 1970, the date of adoption of the new fee schedule. We stated in paragraph 11 of the Report and Order that application processing during the month of July would proceed on a normal basis and that action on applications would not be held up because of the imminence of the August 1 date. We also established this limited exemption in order to eliminate any claim that action on matters filed prior to the date of adoption of the new fee schedule might be delayed until on or after August 1, 1970, so as to be able to exact the new grant fees. Viewed in this light, it is clear that assertions by various petitioners of improper retroactive application of the new fee schedule are without foundation. In no instance is the newly established schedule of fees applicable to any grant which is made prior to August 1, 1970. Thus, what the parties are, in effect, contending is simply that the exemption from the new fee schedule made by the Commission with respect to grants on or after August 1 based on applications filed prior to July 1, 1970, should be enlarged and expanded so as also to exempt grants based on applications filed on or after July 1, 1970, and up to and including August 1, 1970. It is proposed by various parties to enlarge the exemption by changing "prior to July 1, 1970" to such dates as "prior to close of business July 1, 1970", "July 2, 1970", and finally "August 1, 1970". In each instance, it appears that the new exemption date proposed would, if adopted by the Commission, eliminate the grant fee in a particular matter in which the contending party is involved.

5. Apart from the individual benefits sought, however, there appears to be no basis for a change in our action in this regard. No claim of surprise as to the adoption of the new fee schedule can properly be made, since the Notice of Proposed Rule Making had been issued in February 1970,

four and one half months prior to July 1, 1970, and since the Commission's representations to the Congress that a new fee schedule would be adopted by the beginning of fiscal year 1971 had been widely reported. Further, it must be recognized that while these comments have come, in the main, from the broadcast industry, the matter of separate grant fees involves not only broadcast services but also the common carrier services and our equipment approval actions. To now enlarge upon the exemption heretofare made would not only constitute a departure from the sound basis upon which the limited exemption was grounded, but *would also be inequitable with respect to the many applications* which were filed on or after August 1, 1970, but which could have been filed prior to that date had the applicant been aware that the earlier filing would result in a saving of the grant fee. We remain of the view that the action previously taken does not constitute a retroactive application of the newly established schedule of grant fees and that the limited exemption provided heretofore rests upon a sound foundation. We find no reasonable grounds for now enlarging upon this exemption.

6. One additional point requiring reiteration concerns paragraph 11 of the Report and Order in which the Commission stated that applications received on and after August 1, 1970, would be subject to the new fee schedule. Some applicants have, by letter, complained because their applications were postmarked prior to the effective date but were not received in the Commission's offices until after the effective date of the new fee schedule. Such applications have been routinely returned with a notice pointing to the insufficiency of the fee tendered. Normal Commission rules and practices regarding time of filing of documents refer uniformly to the date the document is "filed with the Commission," i.e., received at the Commission's offices. Consequently, the action by the Commission with regard to those applications is in keeping with its normal course of business, and no departure therefrom is justified herein.

Impact of New Fees on "Small Business" Licensees

7. In commending the Commission on its proposed fee schedule, the Senate Appropriations Committee in its Report of June 24, 1970 (Sen. Rep. 91-949) urged the Commission to proceed with caution "in order to insure that the new fees will be equitable in every respect and will not make operations prohibitive or unduly burdensome for the smaller licensees, and in particular, those located in the less populated areas of our country." In addition, the National Association of Broadcasters, in its petition for reconsideration, while recognizing the difficulties in establishing hard and fast levies for exemption of small broadcasters from the annual operating fee, urged the Commission to adopt a liberal waiver policy on an ad hoc basis. The Commission is, of course, deeply concerned with this matter and we have no intention of maintaining fees at such a level as to make their cost prohibitive for persons who seek or who have licenses and are otherwise qualified to be Commission licensees. In this regard, particularly, the Commission will direct its continuing review of all individual charges and will make such revisions and changes as seem to be equitable and warranted in the circumstances.

8. With respect to the broadcast services, we would reiterate our previously stated view that the new fees will not be prohibitive or unduly burdensome to the small station owner. Under the old fee schedule, AM and FM licensees paid a filing fee of $75 for renewal applications which were filed every three years. This has now been eliminated, and, by contrast, the minimum annual operating fee for existing AM and FM licensees of $52 under the new schedule reflects an increase in fees of but $27 per year as against the old schedule. Further, the new schedule establishes an annual operating fee for AM and FM licensees at a level which is twenty-four times the station's highest single one-minute spot rate. Thus, stated another way, the annual fee is equivalent to the price of but two

one-minute spot announcements per month out of the substantial number of commercials which an AM or FM station carries each month. Similarly with TV stations, the old schedule established a fee of $150.00 at license renewal time. When compared to this figure, which is equivalent to $50 a year, the new schedule setting forth a minimum annual fee of $144 cannot be said to be an unduly onerous or prohibitive increase. Also, the annual fee for TV stations is equivalent to twelve times the station's highest 30 second spot announcement—this being equal to the price of only one 30 second spot announcement per month out of the large number of commercial announcements which the average TV station broadcasts each month.

9. The Commission is keenly aware of the significant number of unprofitable broadcast stations and of the contention that the annual operating fees would cause a diminution of program services by broadcast stations, particularly in marginal and unprofitable stations. We would emphasize, however, that no evidence has been submitted in support of these assertions, and that since all broadcast licensees have established financial qualifications sufficient to carry on their broadcast operations, it is highly unlikely that the new fee schedule would constitute a significant burden in a broadcast station's total operation. Further, as we emphasized in our previous Report and Order, while a station's spot rate may not be a precise index of value of the station's license, it is a figure determined upon by the licensee in his own best judgment. And any licensee claiming that the rate card in effect on June 1 (which is to be filed with the Commission as a basis for computing annual fees) is not reasonably descriptive of its yearly average, may petition for the filing of a more appropriate rate card. The Commission will, of course, maintain a continuing review in this area, and if the facts indicate a change is necessary, appropriate revisions will be made. Meanwhile, any broadcast licensee whose financial situation is such that the annual operating fees will cause a diminution of pro-

gram service to the public, or otherwise materially affect his operation, may petition the Commission for a waiver of the annual operating fee for a given period, and show good cause for the relief requested.

10. Several petitioners have pointed out and protested an apparent inconsistency in the fee schedule between the Common Carrier Services and Safety & Special Radio Services with respect to the treatment for fee purposes of mobile stations and multiple transmitters. In general, the schedule for Common Carrier Services established fees on a per station or transmitter basis, while in the Safety & Special Radio Services fees were established on a per application basis without regard to the number of units covered by the application. This inconsistency stems in large measure from differences in the application procedures in the different services. While Safety & Special Radio Services procedures permit the inclusion of a number of mobile units or separate transmitters in one application form, the Common Carrier Services procedures generally require separate applications for each unit. We are in accord with petitioners' view that this inconsistency should be eliminated and that a common approach in principle should be taken in both types of services. We further believe that the approach now reflected in the Common Carrier fee schedule should be generally adopted. Since the size of a communications systems is often reflected in the number of units or transmitters involved, fees based upon this approach should better reflect "value to the recipient" of the Commission's authorizations in these services. In addition, this approach may operate, particularly in the Land Mobile service, to limit the number of units applied for to the number of units actually required for use in a system, thus enhancing the reliability of our data concerning the actual use of licensed facilities. We, therefore, are denying the petitions for reconsideration in this regard and will issue in the near future a Notice of Proposed Rule Making looking to the adoption of such changes in the fee schedules

of these services as are necessary to accomplish a common approach to the establishment of fees.

11. In the fee schedule adopted on July 1, 1970, a fee was established for the grant of applications for assignment of license for, and the transfer of control of broadcast facilities. The grant fee so established was described as "two percent of consideration for assignment or transfer". As we stated in Paragraph 22 of the Report and Order, "The Commission is well aware of the difficulty of computing the consideration in cases where cash or other ascertainable market value is not specified." Our experience during the past eight months has reflected this difficulty and we therefore urge that the parties to such transactions, where the consideration is not specified in cash, submit to the Commission with their application their own estimate of the dollar value of the consideration involved in such assignment or transfer. This should be material assistance to the Commission[4] since, as we have already stated, "there is consideration to support the assignment or transfer in all cases, and the amount of the consideration is therefore a question of fact". In this connection, we have in Paragraph 4 herein, adopted one change with respect to consultant and noncompetition agreements which should simplify the determination of consideration in such cases.

COMMON CARRIER SERVICE

Domestic Public Land Mobile Radio Service

12. The American Trucking Association, Inc., and the American Movers Conference have petitioned for reconsideration of that portion of the Commission's Report and Order which prescribes the filing fee on a per unit basis, rather than on a per application basis as formerly, for applications for license, modification of license or renewal of

[4] However, because of the aforesaid difficulties, we are also considering other means of determining grant fees in such cases.

license for individual mobile stations. As indicated in Paragraph 10 above, we believe this approach is proper and we propose to adopt it for the Safety and Special Radio Services also. These organizations also point out that individual motor carriers hold many DPLMRS mobile statoin licenses authorized in a single multiple unit application, and contend that the $50 fee per unit is excessive, burdensome and without justification. Examples of multiple unit authorizations cited include 2500 units held by Aero-Mayflower, 500 units by Atlas Van Lines and 400 units for United Van Lines. Other companies are listed as about to apply for several hundred mobile station licenses each. Petitioners contend that the cost of obtaining the initial multiple unit license and every five years thereafter at renewal time will place a damper on this type of use of radio to the detriment of the public served by the motor carriers involved and the common carriers who provide service to them. While recognizing that the cost to the government of issuing an authorization is not the sole or decisive consideration, the petitioners aver that the value to the recipient should be counterbalanced against public policy and interest served by making common carrier mobile communications available to the motor carrier industry without the "exorbitant and burdensome" filing fee imposed. Complaints have also been received from single licensees directed against the amount of the fee for individual mobile station authorizations.

13. While recognizing that the present schedule imposes sharply increased fees for mobile stations, we do not feel that the $50 per unit is excessive for single stations, we do not feel that the $50 per unit is excessive for single unit applications, in view of the cost of processing such applications and the value of the authorization to the recipient. However, we agree with the petitioners that the cost of processing an application does not increase in proportion to the number of mobile units requested. We are, there-

fore, modifying the fee schedule to prescribe the $50 filing fee for only the first mobile unit requested in the application, with each additional unit covered by the application being subject to a fee of $30.

Point-to-Point Microwave Radio Service

14. The West Texas and "Joint Petition" challenge the equity and fairness of the grant fee prescribed for modification of construction permits or licenses in the point-to-point microwave radio service in Section 1.1113 on the grounds that the combined fee of $200 ($50 filing and $150 grant) is excessive for the many relative minor modifications involved. The addition of audio services at an average construction cost of $400 is cited as an example where the $200 fee represents an unreasonable and burdensome assessment. Furthermore, the petitioners contend that most applications for license modifications and modifications of construction permits involve only minor engineering changes with little processing cost to the Commission, and cite as examples the correction of cordinates of a station location, change of polarization or azimuth, addition or deletion of subcarrier channels, change of emission or authorized output power, antenna changes and the like. Additionally, it is pointed out in the pleadings that only a $50 fee is prescribed in the Radio Broadcast Service for similar modifications.

15. We believe that this complaint has merit and that the fee schedule should reflect a distinction between major and minor modifications of construction permits or licenses in the point-to-point microwave radio service. We are, therefore, amending this part of the Common Carrier fee schedule so that modifications and changes other than those specifically listed in this part of the schedule shall be subject to an application filing fee of $25.00 and a grant fee of $25.00.

16. Petitions for reconsideration directed against the Satellite Communications schedule were received from RCA Global Communications, Inc., Communications Satellite Corporation, and , jointly, CBS, NBC and ABC Television Affiliates Associations, respectively. All of the petitioners request reconsideration of the $50,000 flat fee for the initial construction of satellite earth stations, essentially on the grounds that the fee is excessive for all but major earth stations. The petitioners contend that the fee schedule as applying to earth stations should recognize the diversity in type, size and cost of such stations that may be required for domestic satellite system or for special satellite common carrier communication purposes in the future. All recommend a percentage of construction cost approach, with RCA suggesting 1%, Com Sat ½ of 1% and the Television Associations 2%, with a maximum of $50,000 as an appropriate measure of the fee to be assessed for each station. Communications have also been received from Senator Gravel of the State of Alaska and others requesting that some provision be made in the schedule of fees to recognize the predicted growth of small and relatively inexpensive earth stations.

17. ComSat also protests the $100,000 fee prescribed for satellite construction and launch, unless it was intended by the Commission that the fee would cover an entire satellite program, regardless of the number of satellites involved, and suggests a fee of $10,000 as appropriate for each operational satellite. Further, ComSat suggests that fee associated with satellite construction should be assessed only upon satellites which are successfully emplaced in orbit and which prove capable of providing commercially acceptable service. Additionally, this carrier recommends that the grant fee for applications filed under Section 214 of the Act for authority to install GCE and multiplex equipment at earth stations be assessed against the cost of

the equipment to be installed, in lieu of the present flat fee per channel established, and suggests ½ of 1% of such cost as appropriate.

18. We believe that the revised schedule adopted herein will satisfy these objections, and will take into account the differing circumstances that may pertain to domestic satellite systems. Specifically, the grant fees for earth stations and satellite constructions generally are to be based on a percentage of construction cost as set forth in the application. For applications for initial construction permit for satellite construction, a relatively nominal flat grant fee is established, with the major grant fee based on a percentage of construction cost, to be assessed after the satellite is successfully launched and capable of commercial operation. The change recommended by ComSat with respect to Section 214 applications is being made in the nonradio section of the schedule.

19. One further point concerning applications for space and earth stations in a domestic satellite system warrants mention. In its *Report and Order* in Docket No. 16495 (22 FCC 2d 86) the Commission decided to consider the issues in that proceeding in the context of concrete applications for authorization of such facilities and invited applications for systems in the 4 and 6 GHz bands, and in a further Notice of Proposed Rule Making in that proceeding, issued September 26, 1970, the Commission invited the submission of alternative system applications proposing higher frequencies. The Commission has accepted for filing an application submitted by Western Union (Public Notice FCC 70–953), and has provided a cut-off date of March 1, 1971, for the filing of applications to be considered in Docket No. 16495 in conjunction with Western Union's application (FCC 70–953). While labeled "applications", such filings are in essence comments on the issues in the Inquiry and Rule Making Proceeding and our invitation for the submission of varied applications reflected the Commission's view that it could best decide the issues in this proceeding

with the assistance of information submitted in application form. Under these circumstances, we believe that the imposition of the normal application filing fees would be inappropriate for such submissions. Therefore, while the established grant fee will be applicable to any authorization of facilities for domestic satellite systems, application for such facilities filed in accordance with the Commission's invitation will not be subject to application filing fees.

20. In addition to the changes noted above, two items have been added to the schedule to identify more clearly the proper fee category for auxiliary station applications, and some minor clarifying language modifications have been made in other fee item descriptions.

Common Carrier Nonradio Applications

21. As recommended by ComSat to conform with the treatment of earth station construction in the satellite communications schedule, we are prescribing that the grant fee for Section 214 applications to establish and provide channels of communication at an earth station via satellite shall be based on a percentage of construction cost, in lieu of a flat charge per channel. In this connection, we are separating Section 214 applications to establish and provide channels of communication via satellite, where no additional construction or installation of equipment is required, and prescribing relatively nominal flat filing and grant fees for these requests.

22. Footnote 9 has been added to the schedule to specify that construction projects undertaken pursuant to grant of continuing authority as permitted in Section 63.03(c) and Section 63.04(c) of the Commission's Rules are subject to the grant fee.

Safety and Special Radio Services

23. Numerous petitions for reconsideration were directed to that part of the revised fee schedules dealing with the Safety and Special Radio Services. In addition, the Com-

mission has received many letters and comments of a less formal nature both before and after the time for filing expired. All this information, to the extent pertinent and relevant, has been included in our consideration of these matters. A letter from the Electronic Industries Association and petitions submitted by R. G. Galbraith, et. al., the California Citizens Band Association, Inc., and the Redwood Citizens Banders, Inc., stated that the grouping together of the bulk of Safety and Special licensees did not show the distinction between the various users, i.e., commercial as against non-commercial, and that a distinction along these lines should be reflected in the fee schedule. Additionally, it was claimed that many Citizens Band licensees would elect to operate on an unlicensed basis rather than to pay the new fees. It was also stated that the increase in fee revenues should result in new enforcement programs.

24. With respect to making a distinction, in terms of fees, between commercial and non-commercial uses of authorized facilities, it should be noted that such a distinction is already reflected in the fee schedule for the Amateur Radio Service (with lesser fees) and for governmental entities using radio facilities (which are exempt from fees). Moreover, no fees are charged for applications filed in the Special Emergency Radio Service by hospitals, disaster relief organizations, beach patrols, school buses, and non-profit ambulance operators and rescue organizations. Similar exemptions are provided for applications related to Closed Circuit Educational Television Service, Civil Air Patrol Stations, Aeronautical Radio-navigation and Search and Rescue Stations and to the Disaster Communications Service. To make further distinctions for fee purposes would, at the present time, present considerable administrative difficulties. For example, in the Citizens Service a licensee is permitted to use the same licensed facilities for business purposes, for substantive personal purposes, and for a combination of these two. Likewise, in the Business Radio Service, eligibility is open to both profit-making and non-

profit making enterprises. We therefore, will make no changes in the fee schedule at the present time to reflect any further distinctions between commercial and non-commercial uses of licensed facilities. However, the Commission is regularly engaged in a continuing review of the fee schedule and the comments of these petitioners in this regard will remain under consideration.

25. The contention that increased unlicensed operation in the Citizens Band would result from the higher fees is hardly worth mentioning. The fact that a prospective licensee would operate illegally rather than pay a fee cannot seriously be considered as a factor against continuing that fee in effect. And there is no evidence to support the contention as to any increase in illegal operation.

26. Insofar as the subject of an expanded enforcement program is concerned, the Commission regularly weighs the need for such activities, together with all other demands on the Commission's time and efforts, and we will continue to do so. It should be noted in this connection that all fee revenues must be turned over to the general funds of the U.S. Treasury and that no part of the fee revenues is retained by the Commission. Our annual budget and appropriation provide both the source of funds and limitations on their expenditure with respect to all activities of the Commission.

27. The Special Industrial Radio Service Association, Inc., (SIRSA) claims that the Commission did not address itself to the original objections to the new fees made to the Commission by SIRSA and, therefore, reiterates them. These include the contentions that the general tax revenues should be utilized for part of the costs of the Commission's activities; that the S&SRSB fee revenues will be in excess of its fair share of the Commission's budget; that the fees for renewal should be less than those established for initial applications; and that the value of S&SRSB licenses has not been adequately determined. Since these contentions

have been fully considered by the Commission previously, in Paragraphs 4–5 and 38 to 43 inclusive of the Report and Order issued July 1, 1970, no useful purpose would be served by repeating our response thereto. We have the same comment with respect to the contentions of the Electronic Marine Products Association that the new fees constitute an unnecessary tax on safety equipment.

28. Three petitioners, the American Radio Relay League, Inc. (ARRL), Chicago Area Radio Club Council, Inc. (Chicago), and the PHD Amateur Radio Association, Inc. (PHD), were concerned with the Amateur section of the fee schedule. The ARRL contends that the impact of the new fees may be so severe as to bring about a decrease in the number of amateur radio operators. ARRL also asserts that the "hundreds of comments" supplied by the Amateurs were ignored because no mention was made of them in the Report and Order adopting the new schedule. The Commission is of the opinion that the ARRL has not demonstrated that the imposition of generally modest fees will have the impact predicted by the League. Concerning the complaint that the Amateurs' comments were ignored, we can only reiterate that the comments were read and considered; notwithstanding that the text of the Report and Order failed to identify each and every comment, there is no reason to conclude that they were ignored. The Chicago and PHD petitions proposed exemptions for various categories of Amateur licensees. Chicago also proposed the waiving of fees for re-examinations for licenses in the Amateur Radio Service after failure to pass the examination on which the original fee had been paid. We believe that the fee exemptions and waiver proposed by Chicago and PHD are not adequately supported by factual showings. To carry out the requested exemptions and to provide for the waiver request would not be in the public interest, since the fees are nominal and modest permitting an Amateur to operate for five years. We are, therefore, denying the petitions of the ARRL, Chicago and PHD.

29. Our attention has also been invited to an oversight which requires correction in the fee schedule for operational fixed stations using frequencies above 952 MHz. Such facilities include, among other things, microwave stations which serve CATV systems and which are authorized for a five year term in the Business Radio Service, and the present schedule calls for a fee of $75. While we have been endeavoring to shift CATV microwave systems to the CARS service, the date by which such systems are required to vacate the Business Radio Service was recently extended to February 1, 1976. At the same time, the Commission, in Docket No. 18916, adopted rules requiring Business Radio Service licensees of such systems to file renewal applications every year rather than every five years, which is the general rule for such service. The difference in fees between BRS and CARS reflects both the broader authorization and longer license term in the former and the lesser fee for CARS systems becomes applicable when a BRS licensee shifts to that service. While we believe it inappropriate to change this difference in fees, it would be equitable to adjust the renewal fee in the BRS on a pro-rata basis to $15 for the filing of annual renewal applications.

Federal Communications Commission Reports

CATV

30. A "Joint Petition for Reconsideration" has been filed on behalf of approximately 200 existing or currently proposed CATV systems, directed against the CATV portion of the new fee schedule (Section 1.1116 of the Rules). Petitioners argue that the schedule is inconsistent with the "fair and equitable" standard of 31 U.S.C. Section 483(a), in that CATV systems have derived little benefit from the current CATV regulatory scheme, which they allege is primarily for the benefit of the broadcasting industry. Petitioners assert that recent rule making proposals in Docket 18397–A indicate that the Commission now embraces the concept of CATV developing as a national broadbrand com-

munications system, and concede that the fee schedule as adopted may be justifiable for such a "truly constructive regulatory scheme." Hence, petitioners urge that we suspend and defer implementation of Section 1.1116 of the Rules until final approval is given to the pending rule making proposals. At that time, it is argued, the Commission will be able to implement the fees necessary to administer the new program. Underlying petitioners' arguments is the premise that a fee schedule must be commensurate with benefits conferred by regulation. But, as we have said and as the statute makes clear, "value to recipient" is but one of the factors to be considered by the Commission in establishing "fair and equitable" fees. Petitioners have advanced no new considerations which would justify a change in our action establishing fees for CATV systems as of August 1, 1970.

31. One specific change in the fee structure is suggested by petitioners, namely, that the fee for petitions for special relief which invoke the mandatory stay provision of Section 74.1105(c) of the Rules should be reestablished at $300, in order to discourage broadcasters from abusing the provision with frivolous pleadings interposed for delay. We have already considered the advisability of imposing a $300 fee and have concluded that such a large amount would be likely to discourage the filing of petitions which may draw attention to situations requiring remedy. There being no new arguments presented, we see no reason to reconsider our judgment.

32. The National Association of Educational Broadcasters filed a request for clarification of the applicability of Section 1.1116 of the Rules to non-commercial educational tax-exempt organizations, some of which are allegedly considering ownership and operation of CATV systems. Consistent with the fee provisions for other regulated services, no fee is contemplated under Section 1.1116, where, pursuant to Section 74.1109 of the Rules, a non-commercial

educational broadcast station files an objection to a CATV system's proposed carriage of a television signal. We are amending Section 1.116 accordingly.

33. Footnote 12 of the Report and Order adopted on July 1, 1970, implies that payment of the CATV annual fee should accompany the filing of a CATV system's annual financial report, if such a report is required as a result of the proceedings in Docket No. 18397. The financial reporting aspect of Docket No. 18397 has not yet been concluded. In the interim and in order to simplify calculation of the appropriate fee, the Commission has issued FCC Form 326–A (Computation of CATV Annual Fee) which must be filed on or before April 1 of each year.[5] Since Commission CATV records are kept on a community basis, a separate Form 326–A, with appropriate annual fee attached, must be filed for each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by CATV facilities, even if there is single head end and identical ownership of facilities extending into several communities.

34. In the course of administering the CATV fee schedule, it has become apparent that certain clarifications and editorial changes are required. We have discovered that, in many instances, a single filing fee has been paid for a notification pusuant to Section 74.1105 of the Rules concerning groups of CATV systems in nearby communities which share a common head end and have identical ownership of CATV facilities. Accordingly, we are adding a note to Section 1.1116 of the Rules to clarify our intention that the same priciple should apply to Section 74.1105 notification fees that applies to our determination whether a CATV system lies within a given signal intensity contour of a television station—namely, that a fee is required for each sepa-

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[5] The Commission has extended the time for filing the CATV annual fee for the 1970 calendar year to May 1, 1971.

rate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by a CATV system, even if there is a single head end and identical ownership of facitlities extending into several communities. See e.g., *Telerama, Inc.*, 3 FCC 2d 585; *Mission Cable TC, Inc.*, 4 FCC 2d 236.

35. Finally, we note that clarification is needed concerning fees for waiver petitions when it proposed, in a single petition, to carry distant signals into more than one community located within the predicted Grade A contour of a television broadcast station in a top-100 television market. Although we have previously indicated that, for the purpose of Section 74.1105 notification fees, a separate fee is required for each community involved, we believe that such a provision would be too onerous in the context of assessing fees for the importation of distant signals into communities having a common head end and identical ownership of CATV facilities. Therefore, we are also adding a note to Section 1.1116 of the Rules to make clear that for purposes of distant station fees only, if the communities involved in a single petition are served by CATV facilities having a common head end and identical ownership, only a single set of station fees is required for all of the communities (rather than a set of station fees for each community mentioned in the waiver petition).[6] Likewise, only a single fee will be required if a waiver petition is supplemented to add an additional distant signal, and no fee will be required if the name of a community having a common head end and identical ownership of CATV facilities with those of previously named communities in a waiver petition is added to that petition.

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[6] i.e., if a waiver petition also serves as a Section 74.1105 notification, a separate $10 fee will be required for each community involved, even though only a single set of station fees will be due for all of the communities.

Broadcast Services

36. Arguments concerning the authority of the Commission to adopt the fee schedule, the impact of the effective date, and waiver of fees have been discussed above. The date, and waiver of fees have been discussed above. This part of the Memorandum Opinion and Order will, therefore, deal only with other matters raised in the petitions for reconsideration and with problems which have arisen in administering the new fee schedule with regard to broadcast services.

37. *Annual License Fee.* The annual license fee is based on the rate card of the station. Paragraph 26 of the Report and Order stated that for AM and FM stations having a joint AM-FM rate, the payment of a single fee based on the highest one-minute joint rate would suffice to cover the operations of both stations and it would not be necessary to allocate part of the joint fee to AM and part to FM and pay two fees. Similar provision was made as to parent-satellite television stations with joint rates. It now appears that some AM-FM operations have both joint rate cards and separate rate cards, and that this is also true for some parent satellite TV operations. Thus, for example, an AM-FM operation may have joint rates for "drive time" and separate rate cards for other periods of the broadcast day. In such situations, separate fees must be paid by the licensee—one for the AM station based on its rate card and one for the FM station based on its rate card. Similarly, where there are separate rate cards in parent-satellite TV operations, separate annual fees must be paid.

38. Section 1.1111 of the fee schedule provides that each broadcast station shall pay an annual license fee. Section 1.1102(c) requires that these fees be paid on or before the anniversary date of the expiration date of the station's license. It also provides that new stations become liable for the fee when they are granted program test authority and

that in the first year, the fee will be pro-rated to cover the period between the date of authorization of program test authority and the next payment date. Questions have arisen as to whether this language means that a permittee operating under program test authority must pay the annual fee at the next payment date for licensees in his State even though it is a permittee and not a licensee, or whether it is not a liable for the fee on the next payment date if it has not yet received a license to cover its construction permit. The intent of Section 1.1102(c) [now redesignated 1.1102(e)] is the former, *i.e.*, any operating station, whether operating under a license or a permit with program test authority, must pay the annual fee, on the date generally applicable to stations in its State.

39. Paragraph 11 of the Report and Order stated that in the first year under the new fee schedule which became effective August 1, 1970, the annual fees for broadcast stations would be pro-rated over the number of full months of operation beginning August 1, 1970. However, some licensees, on their anniversary dates occurring since the fee schedule became effective, have submitted fees for a full year of operation rather than for the number of months of operation between August 1, 1970, and the anniversary date. Such overpayments will not be refunded but will be credited to any future fees—annual operating fees or other fees—that become due for the station.

40. *Construction Permits for TV Stations—Marketing Ranking.* The fee schedule provides that grant fees for construction permits for new TV stations or for major changes in existing TV stations shall vary, depending on whether the station is located in the top 50 markets, the next 50 markets, or the remaining markets. Market rank is determined by the rating of the American Research Bureau (ARB) on the basis of the net weekly circulation for the most recent year. Inasmuch as the ARB no longer regularly ranks markets in this fashion, the rule will be amended to specify use of ARB market ranking, for the

most recent year, based on prime time households (average quarter-hour audience during prime time, all home stations)—a method presently used by ARB for ranking. The ARB "Television Market Analysis" which contains the market rankings is issued about May of each year. While Section 1.1102(b) [now redesignated 11.1102(d)] of the Rules provides that grant fees are payable within 45 days after the grant is made, the amount of the grant fee that is apayable is determined by the market ranking in effect on the date of the grant. Similaraly, the amount of application filing fee which is payable is determined by the market ranking in effect on the date the application is filed.

41. *Exemptions from Certain Assignment and Transfer Fees.* Comments in this proceeding suggested that applications for assignment or transfer occasioned by rules that might be adopted in Docket No. 18110, requiring divestiture on the part of licensees holding multiple media in the same market, should not be assessed fees. Paragraph 23 of the Report and Order issued on July 1, 1970, indicated that Section 1.1104 would guide the Commission in such cases. It should be noted that rules requiring divestiture have been proposed in a Further Notice of Proposed Rule Making in Docket No. 18110, 22 F.C.C. 2d 339 (1970). Whether or not the proposal will be adopted is a decision yet to be made in that proceeding.

42. The National Association of Broadcasters, in its petition for reconsideration, urges a broader exemption with regard to applications related to actions taken in Docket No. 18110. It is the view of NAB that if the Commission is willing to issue a tax certificate in assignment and transfer cases, as set forth in our Public Notice. FCC 70–774, July 16, 1970, it would be consistent not to require payment of the applicable fees in such cases. We would point out, however, that Section 1.1104 of our Rules relates, among other things, to applications which are filed in order to achieve compliance with new or additional requirements of the Commission's Rules and that the rules adopted to date

in Docket No. 18110 do not require divestiture by any licensee of existing facilities. We are of the view therefore that there is no present warrant for adoption of the NAB proposal.

43. In Paragraph 31 of our Report and Order issued on July 1, 1970, we indicated that we had received some specialized comments requesting exemption from fees for broadcast stations operated by tax-exempt organizations on a non-commercial basis even though the station was not classified as an educational station. Because of various questions not then resolved, we stated that we were not prepared to establish such an exemption but would keep the matter under study. We adhere to that position insofar as a general exemption for non-commercial stations is concerned. However, we are persuaded to the view that the fee exemption presently provided in the Safety and Special Radio Services for local governmental entities which operate stations in such services (which by definition is on a non-commercial basis) should, by analogy, be applied to the broadcast services. We are, therefore, adding a new subparagraph (4) to Section 1.1111(b) to provide that fees are not required from local governmental licensees in connection with their operation of a non-commercial broadcast station.

44. *Consultant and Noncompetition Agreement—Assignments and Transfers of Control.* In establishing fees based upon the consideration paid in assignment and transfer transactions, the Commission recognized that such transactions ofttimes involve consultant and noncompetition agreements and that it was necessary to take such agreements into account in determining the consideration paid for such assignment or transfer. Thus in Paragraph 22 of our Report and Order issued on July 1, 1970, we stated that with respect to amounts paid for such agreements that are part of the overall price, the Commission would follow the general principle of tax law which permits a reasonable allocation of the total price to such agreements. Our experi-

ence with this approach discloses considerable difficulties in its application in view of the varying complexities in such agreements. On reconsideration therefore, we believe that the amount to be paid for such agreements should be viewed as part of the total consideration given for the station. Although it can be argued that the consideration for a station is separate and apart from that given for consultant services or noncompetition, the agreement for consultant services or noncompetition may also be viewed as part of the overall package which is being purchased, namely, a station without competition from a specified party or station with certain "consultant" services attached to it. (We note too that many consultant and noncompetition agreements simply reflect an approach designed in the light of tax requirements as a consequence of the overall transaction and from that point of view are quite properly to be treated, even under a principle of allocation, as part of the consideration and subject to the grant fee). On balance, we believe that the latter view is the better one, and it accords with long-standing Commission practice of treating amounts allocated to such agreements as part of the overall consideration for a station. Additionally it avoids the difficult problem of determining whether the amount allocated to such an agreement is a reasonable one, and hence has the virtue of comporting with one of our major concerns in computing fees—that the fee be readily and simply ascertainable. Therefore, our determination of the appropriate fee required to be paid in assignment and transfer matters shall include as part of the "considartion paid," the amounts allocated to such agreements whether such an agreement is part of an overall contract for the sale or transfer of a broadcast station or a separate agreement executed in connection with such sale contract.

45. Numerous questions of a minor nature have been raised during the past six months concerning the language of Sections 1.1102, 1.1103, 1.1116 and 1.1120 of our Rules

relating to fees. Clarifying language has, therefore, been inserted in these Sections, and subsections have been renumbered in Section 1.1102. One such insertion warrants specific mention. In Section 1.1102 of our rules dealing with the payment of fees, we attempted to establish a system of payment which was most practicable to those responsible for the payment of fees and which, at the same time, would not operate to delay or hold up our substantive actions in processing applications and issuing grants, approvals and authorizations. Thus, subparagraph (d)(1) provided that required grant fees are payable within 45 days after grant by the Commission or, in the case of assignments or transfers of control in the broadcast services, immediately following consummation of the transfer or assignment. Unfortunately, however, this accommodation has been abused by some recipients of Commission authorizations in the past six months who have failed or refused to pay the required fee even after specific notification by the Commission. We are, therefore, pointing up, by the insertion of additional language in this sub-paragraph, now numbered Section 1.1102(d), that all grants, approvals and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period, and that failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date. A Joint Petition on behalf of miscellaneous common carriers proposes that the grant fee be payable not within 45 days after the Commission has issued its initial primary authorization, the construction permit, but subsequently upon the filing of the covering license application. However, we are not persuaded that the present requirement places any unreasonable burden upon the recipient of the grant. Further, such an approach would place grant fee payments in a time frame selected by each grantee and this would impose a considerable administrative burden on the Commission.

46. In a Memorandum Opinion and Order issued August 5, 1970 (24 FCC 2d 614), denying various Petitions for Stay of the fee schedules adopted on July 1, 1970, the Commission stated it would maintain adequate records of fee collections so that it could make such refunds as might be appropriate as a result of any changes in the fee schedule which might be adopted by the Commission after determination of the various petitions of reconsideration which had been filed with respect to the new fee schedule. As a result of revisions in the fee schedule adopted herein, certain refunds are in order and appropriate action to accomplish them will be taken by the Commission on its own initiative. The completion of this task may take some time, and the filing of individual requests for refund at this time will only serve to delay the day of completion. It is, therefore, requested that parties await action by the Commission in this regard. If, however, any person claiming entitlement to a refund has not received such refund within 60 days after the issuance of this order, he should then advise the Commission of his claim.

47. As the foregoing paragraphs make clear, major portions of the fee schedule previously adopted by the Commission and made effective as of August 1, 1970, remain unchanged. In the interests of clarity and for ready reference, we are reprinting the entire fee schedule including the changes adopted herein.

48. In view of the foregoing, IT IS ORDERED, That the Petitions noted above are either GRANTED, or DENIED, or GRANTED IN PART or DENIED IN PART, as indicated in the determinations set forth above

49. IT IS FURTHER ORDERED, pursuant to authority contained in Section 4(i) of the Communications Act of 1934 as amended (47 U.S.C. Section 154(i) Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. Section 483(a)), and Budget Bureau Circular A–25 and supplements thereto, that the Schedule of Fees adopted in the Report and Order of July 1, 1970 (FCC 70–694, 35 F.R.

10988) and codified as Subpart G, Part 1, Chapter I Title 47 of the Code of Federal Regulations, is revised to read as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary.*

APPENDIX

SUBPART G—SCHEDULE OF FEES FILED WITH THE COMMISSION

Authority: § § 1.1101–1.1120 issued under sec. 501, 65 Stat. 290; 31 U.S.C 483a

GENERAL INFORMATION

§ § 1.1101 Authority

Authority for this subpart is contained in Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) which provides that any service rendered by a Federal agency to or or for any person shall be performed on a self-sustaining basis to the fullest extent possible. Title V further provides that the head of each Federal agency is authorized by regulation to prescribe such fees as he shall determine to be fair and equitable.

§ § 1.1102 Payment of fees.

(a) *Filing fees.* Each application, including either a petition or notification submitted under the CATV Rules, filed on or after August 1, 1970, for which a fee is prescribed in this subpart, must be accompanied by a remittance in the full amount of the filing fee. In no case will an application or other filing be accepted for filing or processed prior to payment of the full amount specified. Filings for which no remittance is received, or for which an insufficient amount is received, shall be returned to the applicant without processing. In the case of multiple applications for which a single check is drawn to over all fees for the applications, there should be attached to the remittance an accounting sheet or notice stating what fees are covered by the check or money order.

(b) *Grant fees.* The applicant shall observe the instructions contained in the Notice of Grant concerning payment of grant fees. Grant fees shall be accompanied by a transmittal advice identifying the purpose of the check. The duplicate copy of the Commission's Notice of Grant, which will specify the amount of the fee, will suffice.

(c) *All remittances should be accompanied by a letter application, rate card, grant fee notice or other document to properly identify the purpose of the fee.*

(d) Where a grant fee is prescribed in the various services, the fee will be payable within 45 days after grant by the Commission. In the Broadcast services, the grant fee, based on a percentage of the consideration, in assignment and transfer cases must be *transmitted* by the new licensee immediately following consummation of the transfer or assignment. All grants, approvals and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period. Failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date.

(e) *Annual Broadcast fees.* The annual fee prescribed for broadcast stations must be submitted each year on or before the anniversary date of the expiration date of the station's license. The licensee shall file the station's rate card as of the preceding June 1 together with the amount of the annual fee. A new station first becomes liable for the annual operating fee at the time program test authority is granted. In the first year, the fee will cover the period from the date of program test authority until the next payment date. (Example, if a station is in operation for seven full months prior to the next payment date, the fee is 7/12 of the annual rate).

(1) If a station has filed an application for renewal of a station license that will expire after July 31, 1970, any filing fee paid with the renewal application will be credited

against the initial annual operating fee. Should a licensee pay the former renewal fee which is no longer required, there will be no refund of the filing fee; it will however be credited against the next annual fee for the station. Licensees should note that they are claiming this credit at the time they submit their rate card and pay their first annual operating fee.

(f) *Annual CATV fees.* The annual fee prescribed for CATV systems must be submitted by April 1 for the preceding calendar year. A new CATV system becomes liable for the annual operating fee as of the date it begins to charge for service to 50 subscribers or more. In the first year of operation of the system, the fee will be computed based on the average of the number of subscribers being served on the last day of each quarter of operation up to the end of the calendar year. (Example, if a system is in operation on the last day of three quarters prior to the end of the calendar year, the average of those three last-day figures it to be used in computing the fee required). The fee will cover the number of full months of operation for seven full months prior to the end of the calendar year, the fee is 7/12 of the anuual rate.) In the first year of this fee schedule, a CATV system's annual fee shall be computed by taking the amount otherwise due and multiplying it by five-twelfths.

(g) Applications and attached filing fees should be addressed to: Federal Communications Commission, Washington, D.C. 20554, or to the appropriate FCC Field Office and should not be marked for the attention of any individual, bureau or office. Fee payments should be in the form of a check or money order payable to the Federal Communications Commission. The Commission will not be responsible for cash sent through the mails. All fees collected will be paid into the United States Treasury, as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483a).

(h) Receipts will be furnished upon request in the case of payments made in person, but no receipts will be issued for payments sent through the mails.

(i) Excepts as provided in §§ 1.1103 and 1.1104, all application filing fees will be charged irrespective of the Commission's disposition of the application. Applications returned to applicants for additional information or corrections will not require an additional fee when resubmitted, unless the additional information results in a major change in the application; the resubmission will then be treated as a new application requiring a new filing fee.

§ 1.1103 Return or refund of fees.

(a) The full amount of any fee submitted will be returned or refunded, as appropriate, in the following instances:

(1) Where no fee is required for the application filed.

(2) Where the application is filed by an applicant who cannot fulfill a prescribed age requirement.

(3) Upon return of an application for renewal of an operator license which is received after expiration of the grace period.

(4) Where the applicant is precluded from obtaining a license by the provisions of section 303(1) or 310(a) of the Communications Act.

(5) Where circumstances beyond the control of the applicant, arising after the application is filed, would render a grant useless.

(6) When applications (accompanied by fees) are filed where not actually required by Safety and Special Radio Services rules (e.g., change of address, pro forma change or corporate name, etc.).

(7) When construction permit holders and licensees make nonsubstantive corrections in license grants within a period of 60 days from grant.

(b) Payments in excess of an applicable fee will be refunded only if the overpayment exceeds $2.00.

§ 1.1104 General exceptions.

(a) No fee is required for an application filed for the sole purpose of amending an authorization or pending application (if a fee is otherwise required) so as to comply with new or additional requirements of the Commission's rules or the rules of another Federal government agency affecting the authorization or pending application; however, if the applicant also requests an additional modification or the renewal of his authorization, the appropriate modification or renewal fee must accompany the application. Fee exemptions arising out of this general exception will be announced to the public in the orders amending the rules or in other appropriate Commission notices.

(b) No fee is required for an application filed by an alien pursuant to a reciprocal radio licensing agreement.

(c) A receiver model certified prior to August 1, 1970, and which will continue to be distributed after August 1, 1970, need not be recertificated and no filing or grant fee shall be required for continued distribution provided it will continue to be distributed under the same trade name and model number and with identical circuitry.

§ 1.1105 General Rules (STA and Waiver).

Except as otherwise provided no filing fee is required for any application or request for special temporary authority (STA) or waiver of brief duration or minor character in any service or for the grant of either an STA or a waiver of brief duration or minor character. Upon the grant of an application or request for either an STA or a waiver of an important character, the applicant will be notified to remit a fee in the following amount for the respective services:

Broadcast Services	$25.00
Common Carrier Services	25.00
Safety and Special Radio	5.00
Cable Television Services	25.00

§ 1.1111 Schedule of fees for Radio Broadcast Services.

(a) Except as provided in paragraph (b) of this section the fees prescribed below are applicable to applications and operations in the Radio Broadcast Services:

CONSTRUCTION PERMITS

Application for construction permit for new station or for major changes in existing station:

	Filing fee	Grant fee
VHF—Top 50 markets[1]	$5,000	$45,000
UHF—Top 50 markets	2,500	22,500
VHF—Next 50 markets	2,000	18,000
UHF—Next 50 markets	1,000	9,000
VHF—Balance	1,000	9,000
UHF—Balance	500	4,500
FM—Class A	100	900
FM—Class B and C	200	1,800
AM—Day—50 kw	500	4,500
AM—Day—25 kw	400	3,600
AM—Day—10 kw	300	2,700
AM—Day—5 kw	200	1,800
AM—Day—1 kw	100	900
AM—Day—500 w	50	450
AM—Day—250 w[2]	25	225
AM—Unlimited 50 kw	1,000	9,000
AM—Unlimited 25 kw	800	7,200
AM—Unlimited 10 kw	600	5,400
AM—Unlimited 5 kw	400	3,600
AM—Unlimited 1 kw	200	1,800
AM—Unlimited 500 w	100	900
AM—Unlimited 250 w[2]	50	450
AM—Class IV	100	900
For Directional Antenna in addition to the above	50	450

[1] The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

[2] The fee for major changes in 100 watt operations is the same as for 250 watt operations.

Other Applications

The following fees shall accompany each application:

	AM	FM	TV	Auxiliary [1]
Applications filed on FCC Form 316 (where more than one broadcast station license is involved, the application must be accompanied by the total amount of the fees prescribed for each license so involved).	$250	$250	$250	No fee
Application for construction permit to replace expired permit, FCC Form 321.[2]	500	500	500	$50
Application for modification other than a major change.	50	50	50	50
Application for change of call sign for broadcast station.	100	100	100	No fee
All other applications in the broadcast services.	50	50	50	50

[1] With respect to applications for remote pickup broadcast stations authorized under Subpart D of Part 74 of this chapter, one fee will cover the base station (if any) and all the remote pickup mobile stations of a main station, provided the applications therefor are filed at the same time.

[2] The $500 fee applies to construction permits for new stations or major changes in existing stations. An application to replace a construction permit for a modification other than a major change must be accompanied by a fee of $50 in all services.

Subscription Television

Application for Subscription Television Authorizations:

Application Filing Fee $1,000

Assignments and Transfers

Application for assignment of license or transfer of control, exclusive of FCC Form 316 applications (where more than one broadcast station license is involved, the total amount of fees prescribed for each license so involved will be paid in the manner set forth below):

Application Filing Fee.	$1,000.
Assignment and Transfer fee to be paid immediately following consummation of the assignment or transfer.	2 percent of consideration for assignment or transfer.

ANNUAL LICENSE FEES

Each broadcast station shall pay an annual license fee to the Commission that is based on the station's rate card as of June 1 of each year.[1]

For AM and FM radio stations:

The annual fee will be a payment equal to 24 times the station's highest single "one-minute" spot announcement rate, but in no event shall the annual payment for each AM and each FM station be less than $52;

For television broadcast stations:

The annual fee will be a payment equal to 12 times the station's highest "30-second" spot announcement rate, but in no event shall the annual payment be less than $144.

(b) Fees are not required in the following instances:

(1) Applications filed by tax exempt organizations for the operation of stations providing noncommercial educational broadcast services, whether or not such stations operate on frequencies allocated for noncommercial educational use.

(2) Applications in the AM service requesting only authority to determine antenna power by direct measurement.

(3) All television translator applications and all television translator relay stations.

(4) Applications by local government entities in connection with the licensing or operation of a non-commercial broadcast station.

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[1] In the first year of this fee schedule, a station's fee will be computed by taking the number of months from the effective date to the payment date divided by 12 times the full year annual fee. Stations beginning operation, pursuant to program test authority, after the license expiration anniversary date are liable for a pro rata amount of the annual fee equal to the number of full months in operation from the date of program test authority to the payment date for the short period.

§ 1.1113 Schedule of fees for Common Carrier Services.

Applications filed for Common Carrier Services shall be accompanied by the fees prescribed below:

	Filing fee	*Grant fee*
Domestic public land mobile radio service [1]		
Application for initial construction permit or for relocation of a base station, including authority for mobile units, blanket dispatch station authority,[2] and standby transmitters without independent radiating systems.[3] [4]	$100	$150.
Application for initial construction permit or for relocation of a dispatch station,[5] auxiliary test station, control station or repeater station.[4]	50	$75.
Application for other than initial construction permit, modification of construction permit or license for base station, dispatch station, auxiliary test station, control station or repeater station at an existing station location.	25	$50.
Application for renewal of base station.	25	$125.
Application for renewal of license for dispatch station, auxiliary test station, control station or repeater station.	10	$50.
Application for license, modification of license or renewal of license for individual mobile stations:		
One mobile unit per application.	50	None.
Each additional mobile unit per application.	30	None.
Rural radio service		
Application for an initial construction permit or for relocation of central office, inter-office or relay facilities.[4]	100	$100.
Application for other than initial construction permit, modification of construction permit or license for central office, inter-office or relay facilities.	25	$50.

	Filing fee	Grant fee
Application for license or modification of license for individual subscriber stations.	5	$20.
Application for license for operation of rural subscriber stations at temporary-fixed locations.	10	$20.
Application for renewal of license of central office, inter-office or relay station.	125	None.
Application for renewal of license of rural subscriber station.	25	None.
Point-to-point microwave radio services		
Applications for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to existing points of communication or for relocation of facilities.[4] [6]	50	$150.
Application for license for operation of a station at temporary-fixed locations.	50	$100.
Application for other modification of construction permit or modification of license.	25	$25.
Application for renewal of license.	25	$100.
Local television transmission service		
Application for construction permit or for modification of construction permit to add or change point(s) of communication or to increase service to an existing station location or for relocation of facilities.[4]	50	$150.
Application for license for operation of an STL station at temporary-fixed locations.	50	$100.
Application for license for operation of a mobile television pickup station.	50	$100.
Application for other modification of construction permit or modification of license.	25	$75.
Application for renewal of license.	25	$50.

	Filing fee	Grant fee
International fixed public radiocommunication services		
International Fixed Public Station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[4]	150	$500.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitters(s) being replaced if both applications are filed simultaneously).	75	$100.
Application for change of location of an authorized station	150	$400.
Application for modification of license	25	$100.
Application for renewal of license	100	$200.

See footnotes at end of table.

	Filing fee	Grant fee
International Control Station:		
Application for an initial construction permit for a new station or an additional transmitter(s) at an authorized station.[4]	100	$400.
Application for construction permit for a replacement transmitter(s) at an authorized station (no fee will be charged for application for modification of license to delete transmitter being replaced if both applications are filed simultaneously).	50	$250.
Application for change of location of an authorized station	100	$400.
Application for modification of license	25	$100.
Application for renewal of license	50	$100.

	Filing fee	Grant fee
Other Radio Applications		
Application for assignment of an authorization or transfer of control (a separate fee is required for each call sign covered by the application).	10	$50.
All other common carrier radio applications	25	None.
Satellite Communications Services[7]		
Application for initial construction permit for commercial transmit/receive earth station.[4]	200	½ of 1% of construction cost as set forth in the application, not to exceed $25,000.
Application for initial construction permit for a commercial receiver only or transportable earth station.[4]	100	½ of 1% of construction cost as set forth in the application, not to exceed $25,000.
Application for initial construction permit for an earth station to be used solely for development or noncommercial purposes.[4]	50	$100.
Application for renewal of license for a developmental or non-commercial earth station.	50	$100.
Application for modification of construction permit or license or for construction permit for additional equipment at an existing commercial earth station.	100	½ of 1% of construction cost as set forth in the application.
Application for authority to operate a transportable earth station at a fixed site	100	$200.
Application for renewal of license for a commercial transmit/receive earth station.	100	$5,000.
Application for renewal of license for a commercial receiver only earth station.	50	$500.
Application for initial construction permit or modification of construction permit or license for an auxiliary station (boresight) to an earth station or for a telemetry, tracking, and control station.	50	½ of 1% of construction cost as set forth in the application.

	Filing fee	Grant fee
Application for renewal of license of an auxiliary station to an earth station or for a telemetry, tracking, and control station.	50	$200.
Application for initial construction permit per satellite	250	$5,000.
Application for authority to launch and operate satellites, per satellite.	250	½ of 1% of satellite construction cost as set forth in the application (due 45 days after successful launch and operation).
Application for assignment of a commercial transmit/receive earth station or satellite construction permit or license or transfer of control of a licensee or permittee, per earth station or satellite.	$100	$200.
Application for assignment of a commercial receive only or transportable earth station construction permit or license or transfer of control of a licensee or permittee, per earth station.	25	$50.
Application for communications common carrier for authorization to own stock in the Communications Satellite Corporation.	25	$50.
Any other application filed under the Communications Satellite Act or the Communications Act of 1934 in the Satellite Communications Services.	25	$50.
Common Carrier Nonradio Applications		
Section 214 applications for construction landline coaxial cable[9]	100	$5 per route mile.
Section 214 applications to extend or supplement facilities by construction of land line voice cables or installation of carrier equipment on landline wire, cable or radio routes.[9]	50	$6 per 100 equivalent 4 kHz channel miles authorized.[10]
Section 214 applications to lease facilities from other carriers (except overseas channels).[9]	25	$4 per 100 equivalent 4 kHz channel miles authorized.[4]
Section 214 application for overseas cable construction	1,000	$50 per route mile (nautical).

	Filing fee	*Grant fee*
Section 214 applications to establish communication channels on overseas cables.[10]	50	$10 per 100 equivalent 3 kHz miles authorized.[10]
Cable landing license	100	$100.
Section 214 application to acquire overseas cable channels	50	$6 per 100 equivalent 3 kHz channel miles authorized.[10]
Section 214 application to acquire domestic circuits to interconnect international circuits:		
Circuits outside of the United States	25	None.
Circuits within the U.S. or Territories	25	$4 per 100 equivalent 4 kHz channel miles authorized.[8 10]
Section 214 applications to install carrier equipment to establish channels of communication at an earth station.	100	½ of 1% of equipment and installation cost as set forth in the application.
Section 214 application to establish and provide channels of communication via satellite.	50	$200.
Section 214 application to acquire satellite channels	50	20 per equivalent 4 kHz channel.
Section 214 applications to discontinue, reduce or impair services to the public:		
Telephone companies	50	$50.
Telegraph Companies	10	$15.
Public Coast Stations	10	$15.
Interlocking Directorate applications	10	$40.
Section 221 applications	10	$250.
Tariff applications to change charges or regulations on less than statutory notice	25	None.

	Filing fee	*Grant fee*
All other Common Carrier nonradio applications	25	None.

[1] In this service each transmitter at a fixed location is a separate station notwithstanding the inclusion of more than one such station on a single authorization or under a single call sign.

[2] When included as part of a base station application, a request for blanket dispatch station authority made pursuant to the provisions of § 21.519(a) of this chapter does not require an individual application. A request for such dispatch station authority filed separately from a base station construction permit application requires an application for modification of license and an appropriate fee.

[3] An application for a standby transmitter having its own independent radiating system requires the same fee as a base station application.

[4] No additional fee will be charged for applications for licenses to cover a construction permit unless there is a modification or variation of outstanding authority involved. In that event the appropriate fee for modification is applicable.

[5] This fee applies to any request for dispatch station authority not made pursuant to § 21.519(a) of this chapter.

[6] For applicants who propose to multiplex their radio systems and who make the supplementary showing required by § 21.706 of the Rules in the lead application in lieu of filing a separate application under Section 214 of the Act, an additional grant fee will be payable at the rate of $6 per 100 equivalent 4 kHz channel miles, as prescribed in the schedule for Section 214 applications to extend or supplement facilities.

[7] The filing fees specified in the schedule for satellite communications services do not apply to initial applications for domestic systems to be considered in conjunction with that of Western Union; Public Notice FCC 70-953. However, the grant fees will be applicable to any grant. All subsequent applications will be subject to the filing as well as the grant fees.

[8] In the case of connecting circuits for international satellite circuits the mileage is computed as the distance from the United States terminal to the nearest earth station.

[9] Projects undertaken pursuant to grant of continuing authority as prescribed in §§ 63.03(c) and 63.04(c) of the Commission's Rules are subject to the grant fee.

[10] Fees for other than 4 kHz channnels or 3 kHz channels will be the appropriate multiples or fractions of the 4 kHz or 3 kHz channel fee.

(b) Except as provided in paragraph (c) of this section, the fees set forth below shall accompany the following applications or requests filed in the Safety and special Radio Services:

Duplicate license 6

(c) Fees are not required in the following instances:

(1) Applications filed in the Police, Fire, Forestry-Conservation, Highway Maintenance, Local Government, and State Guard Radio Services.

(2) Applications filed by governmental entities in any of the Safety and Special Radio Services.

(3) Applications filed by the following in the Special Emergency Radio Service: Hospitals, Disaster Relief Organizations, Beach Patrols, School Buses, and non-profit Ambulance Operators and Rescue Organizations.

(4) Applications filed in the Disaster Communications Services.

(5) Applications for ship inspections pursuant to the Great Lakes Agreement, the Safety of Life at Sea Convention, and Parts II and III, Title III, of the Communications Act of 1934, as amended.

(6) Applications for Novice Class license in the Amateur Radio Service, applications for amateur stations under military auspices, and applications filed in the Radio Amateur Civil Emergency Services (RACES).

(7) Operational fixed Microwave Applications filed for Closed Circuit Educational Television Service.

(8) Applications for Civil Air Patrol Stations, Aeronautical Radionavigation Stations and for Aeronautical Search and Rescue Stations.

§ 1.1116 Schedule of fees for Cable Television Services.

(a) Applications, notifications and petitions filed in the Cable Television Services shall be accompanied by the fees prescribed below:

Applications in the Community Antenna Relay Service (CARS)

For a construction permit	$50
For a license or renewal	15
For a modification of construction permit or license	15

Petitions

For special relief (other than that specified below), pursuant to § 74.1109	25
For experimental operations pursuant to paragraph 51 of the December 1968 *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397* (see also, proposed § 74.1107 (b) and (c) in Appendix C of that *Notice*)	25
For waiver of hearing re carriage of distant signals within the Grade A contour of a television broadcast station in a top-100 market:	
Per proposed commercial (a) VHF station or (b) network-affiliated UHF station, distant signal	25
Per proposed (a) educational station or (b) independent UHF station, distant signal	10

Note: For purposes of the station fees only, if the communities involved in a single petition are served by CATV facilities having a common head end and identical ownership, only a single set of station fees is required for all of the communities.

Notifications pursuant to § 74.1105	10

Note: A fee is required for each separate and distinct community or municipal entity (including single, discrete, unincorporated areas) served by a CATV system, even if there is a single head end and identical ownership of facilities extending into several communities. See, e.g., Telerama, Inc., 3 FCC 2d 585; Mission Cable TV, Inc., 4 FCC 2d 236.

(b) An annual fee shall be paid by each CATV system on or before April 1 of each year for the preceding calendar year. The fee for each system shall be equal to the number of its subscribers times 30 cents. The number of subscribers shall be determined by averaging the number of subscribers on the last day of each calendar quarter. (See § 1.1102(c)).

Note: Where a system offers bulk-rates to multiple-outlet subscribers, such as apartment house or motel operators, each bulk-rate contract is viewed as a number of subscriptions to be calculated by dividing the total annual charge for the bulk-rate contract by the system's basic annual subscription rate for an individual household. (Thus, for example, if a CATV system charges an apartment house operator $1000 a year for a bulk-rate contract and charges individual households a basic rate of $50 per year, the bulk-rate contract is counted as 20 subscriptions (i.e. 1000÷50=20). Where a variety of "annual subscription rates" for individual households exists (e.g., $50 per year, if paid in one sum, or $60 per year, if paid on a per-month basis), the rate used in the subscriber formula should be the lowest annual rate which is offered to individual subscribers ($50 here). Likewise, if the bulk-rate contract is on a monthly basis, it should be divided by the lowest monthly rate which is offered. In the preceding example, a $50 per year charge should be viewed as a charge of $4.17 per month. It is not contemplated, however, that such calculations should be made with respect to extra payments for additional CATV outlets within the same individual household.

(c) Fees are not required in the following instances:

(1) Petition for special relief filed pursuant to Section 74.1109 by a non-commercial educational broadcast station.

§ 1.1117 Schedule of fees for commercial radio operator examinations and licensing.

(a) Except as provided in paragraph (b) of this section, applications filed for commercial radio operator examinations and licensing shall be accompanied by the fees prescribed below:

Applications for operator license

First-class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	$5
Second-class license, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	4
Third-class permit, either radiotelephone or radiotelegraph, new, renewal, duplicate or replacement	3
Provisional radiotelephone third-class operator certificate with broadcast endorsement—1 year term	2
Restricted radiotelephone permit, new, duplicate, or replacement	8
Restricted radiotelephone permit (alien)—1 year term	2
Application for endorsement of license	2
Application for verification card (FCC Form 758-F)	2
Application for posting statement (FCC Form 759)	2

(b) Whenever an application requests both an operator license and an endorsement, the required fee will be the fee prescribed for the license document involved.

§ 1.1119 Experimental Radio Services (other than Broadcast).

Fees are not required in the case of applications filed in the Experimental Radio Services (other than Broadcast).

§ 1.1120 Schedule of fees for equipment type approval, type acceptance and certification.

Type approval, type acceptance, certification or approval of subscription television systems shall require payment of fees as prescribed below.

Certification

Item	Filing fee	Grant fee
1. Application for certification of each receiver Model:		
(a) Television broadcast receiver	$ 10	$ 40
(b) FM broadcast receiver	10	30
(c) Any other receiver	10	25
2. Application for prototype certification of equipment operating under Part 18	5	20
3. Request for modification of certificated receiver with no change in model number: [1]		
(a) Television broadcast receiver	10	30
(b) FM broadcast receiver	5	20
(c) Any other receiver	5	20
See footnotes at end of table.		
4. Request for modification of a prototype certificated equipment operating under Part 18 with no change in model number.[1]	5	15
5. Application for certification of a radio control transmitter for a door opener under Part 15.	5	20
TYPE ACCEPTANCE		
1. Application for type acceptance of each equipment type [2 3 4 5]	25	75
2. Application for the addition of one or more rule parts to existing type acceptance for each equipment type as identified by manufacturer (or trade name) and type number.	25	75
3. Approval of subscription television system	200	800

Certification

Item	Filing fee	Grant fee
TYPE APPROVAL [6] [8]		
1. Application or submission for type approval: [7]		
(a) Part 73:		
(1) Broadcast modulation monitors—SCA & stereo	100	400
(2) Broadcast modulation monitors—other	50	200
(3) Other broadcasting equipment	50	200
(b) Parts 81 and 83:		
(1) Ship transmitters including lifeboat transmitters	25	125
(2) Radar	25	75
(3) Ship automatic alarm systems	50	200
(4) Ship alarm automatic keyers	25	75
(5) Other maritime devices	50	150
(c) Part 15:		
(1) Wireless microphones	25	125
(2) Other low-power devices	25	75
(d) Part 18:		
(1) Medical diathermy	100	400
(2) Epilators	100	400
(3) Microwave ovens	200	800
(4) Medical ultrasonic	50	200
(5) Industrial ultrasonic	50	200
(6) Other ISM devices	50	200
2. Applications for modification of existing type approved equipment: [8]		
(a) Modifications which require testing:		
(1) Parts 73 and 18	50	200
(2) Parts 15, 81, and 83	25	75
(b) All other modifications	10	40

[1] A request for modification of certificated equipment which involves a change in type (or model) number will be considered as an application for a new certification under items 3 and 4 of the schedule.

[2] The receiver part of a transceiver or a unit which includes a transmitter and receiver shall be separately certificated. The application for receiver certification shall be filed simultaneously with, but under separate cover from, the application for type acceptance.

[3] In the case of an equipment in which one or more receivers and transmitters are packaged at an individual equipment and identified by a single type number, each receiver shall be separately certificated. The application(s) for

certification for each receiver shall be filed simultaneously with, but under separate cover from, the application for type acceptance.

[4] Application(s) for type acceptance of equipments which bear different identification will be considered separate applications, regardless of whether such equipment may be otherwise identical.

[5] Fees for type acceptance are not required in the following cases:

(a) When a request for type acceptance is included in an application for station license and covers only the item of equipment to be authorized in that particular station;

(b) When a request is made by the licensee of a station for approval of modifications to a specific item of existing type accepted equipment authorized in that particular station.

[6] Whenever an item subject to type approval is required to comply with more than one set of technical specifications, separate fees will be required for each set of technical specifications for which compliance is examined. For example, a combined frequency and modulation monitor will require the payment of fees applicable to each; a frequency monitor for standard broadcast and FM broadcast will require payment of fees applicable to each. Likewise, combination units of items of the same type, for example, a combination of two radars, will require the payment of two fees.

[7] Application(s) for type approval of equipment which bear different identification will be considered separate applications, regardless of whether such equipment may be otherwise identical.

[8] A request for modification of a type approved equipment which involves a change in type (or model) number will be considered as an application for a new type approval under item 1 of the schedule.

[9] Initial applications for type approval which request use of alternate magnetrons or other critical components will require payment of the fee indicated in 1 plus the fee required in 2(a).

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[Caption Omitted in Printing]

Memorandum Opinion and Order

Adopted: April 30, 1971 Released: April 30, 1971

By the Commission: Commissioners Bartley and Houser absent.

The Commission has before it a Joint Petition for Stay and for Expedited Consideration filed on April 20, 1971, by the National Cable Television Association, Inc., (NCTA) and the California Community Television Association, Inc., (CCTA), Petitioners.

1. Petitioners ask us to stay the effectiveness of the Commission's fee schedule as it relates to fees charged cable television (CATV) systems, pending review on the merits by the United States Court of Appeals for the Ninth Circuit pursuant to the Petition for Review which Petitioners filed in that court on April 19, 1971, and for any subsequent court review.

2. The major purpose of a stay is "to save the public interest from injury or destruction" while other available remedies are being pursued. *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 15 (1942). Thus, even a showing of substantial private harm is not sufficient where the public interest would be impaired by a grant of the stay. *Yakus* v. *United States*, 321 U.S. 414, 440 (1944). To the extent that private injury may be considered in issuing a stay, the injury must be irreparable. As the Court observed in *Virginia Petroleum Jobbers Association, Inc.* v. *F.P.C.*, 104 U.S. App. D.C. 106, 110, 259 F.2d 921, 926 (1958) "The key word in this consideration is *irreparable*. More injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."

3. Petitioners urge that the CATV fee schedule be stayed while the Court reviews the fee schedule. If a stay is not issued, according to Petitioners, then CATV systems will suffer irreparable injury by "The payment of the fees, the time spent administratively, and the need to divert funds from other uses will cause severe hardship and will result in economic injury beyond that of just the payment itself." Petitioners further state, "The irreparable nature of the injury to petitioners' members resulting from the contested payments is particularly explicit in this instance: Neither the Commissioner's *Final Report and Order* nor the Independent Offices Appropriation Act contains a provision for refund of payments erroneously or improperly collected by the Commission. Compare, *Reams* v. *Vrooman-Fehn Printing Co.*, 140 F.2d 237, 241 (6th Cir. 1944). Furthermore, the lack of present Commission information or mechanism for its retrieval, makes accurate refunding to CATV systems less than certain. And the public interest would hardly be served by legal action for refunds by the 2,500 CATV systems across the country."

4. Petitioners' request will be denied because they have failed to establish irreparable injury to the CATV industry and because the paramount public interest would be adversely affected by a stay. The Petitioners erroneously assert that the Commission has no mechanism for repayment of fees. In a Memorandum Opinion and Order issued August 6, 1970, (24 FCC 2d 614) the Commission sets forth the manner in which fees would be refunded; see also Memorandum Opinion and Order Released April 1, 1971, paragraph 46 (36 FR 6056). The Commission will maintain adequate records so that it can make refunds in the event judicial review results in a revision of the fee schedule.

5. ACCORDINGLY, IT IS ORDERED That the Joint Petition for stay filed by the National Cable Television Association, Inc., and the California Community Television Association, Inc., on April 20, 1971, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

BEN F. WAPLE
Secretary

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EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
WASHINGTON 25, D. C.

September 23, 1959 CIRCULAR No. A-25

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: User Charges

1. *Purpose.* Bureau of the Budget Bulletin No. 58-3 of November 13, 1957, set forth some general policies for developing an equitable and uniform system of charges for certain Government services and property. This Circular incorporates the policies contained in that Bulletin and gives further information with respect to: (a) the scope of user charge activities; (b) guidelines for carrying out the approved policies; and (c) agency submission of periodic status reports. It also prescribes Standard Form No. 4 on which periodic status reports are required.

Because this Circular applies also to the areas previously covered by Bureau of the Budget Circular No. A-28 of January 23, 1954, that Circular is hereby rescinded.

2. *Coverage.* Except for exclusions specifically made hereafter, the provisions of this Circular cover all Federal activities which convey special benefits to recipients above and beyond those accruing to the public at large. The specific exclusions which continue to be governed by separate policies are fringe benefits for military personnel and civilian employees; sale or disposal under approved programs of surplus property; postal rates; interest rates; and fee aspects of certain water resources projects (power, flood control, and irrigation). In addition this Circular does not

apply to activities of the legislative and judicial branches, the municipal government of the District of Columbia, the Panama Canal Company or the Canal Zone Government.

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure

and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

b. *Lease or sale.* Where federally owned resources or property are leased or sold, a fair market value should be obtained. Charges are to be determined by the application of sound business management principles, and so far as practicable and feasible in accordance with comparable commercial practices. Charges need not be limited to the recovery of costs; they may produce net revenues to the Government.

4. *Agency responsibility.* The responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies in this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices.

5. *Cost, fees and receipts, and their determination.*

a. *Determination of costs.* Costs shall be determined or estimated from the best available records in the agency, and new cost accounting systems will not be established solely for this purpose. The cost computation shall cover the direct and indirect costs to the Government of carrying out the activity, including but not limited to:

(1) Salaries, employee leave, travel expense, rent, cost of fee collection, postage, maintenance, operation

and depreciation of buildings and equipment, and personnel costs other than direct salaries (e.g., retirement and employee insurance);

(2) A proportionate share of the a[illegible]cy's management and supervisory costs;

(3) A proportionate share of military pay and allowances, where applicable;

(4) The costs of enforcement, research, establishing standards, and regulation, to the extent they are determined by the agency head to be properly chargeable to the activity.

b. *Establishment of fees to recover costs.* Each agency shall establish fees in accordance with the policies and procedures herein set forth. The provisions of this Circular, however, are not to be construed in such a way as to reduce or eliminate fees and charges in effect on the date of its issuance. The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. The cost of providing the service shall be reviewed every year and the fees adjusted as necessary. In establishing new fees and increasing existing fees the agency may make exceptions to the general policy (paragraph 3, above) under such conditions as illustrated below.

(1) The incremental cost of collecting the fees would be an unduly large part of the receipts from the activity.

(2) The furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization; or comparable fees are set on a reciprocal basis with a foreign country.

(3) The recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(4) Payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program.

c. *Disposition of receipts.* Legislative proposals shall generally avoid disturbing the present rule that collections go into the general fund of the Treasury as miscellaneous receipts. However, exceptions may be made where:

(1) It is intended that an agency or program or a specifically identifiable part of a program be operated on a substantially self-sustaining basis from receipts for services performed or from the sale of products or use of Government-owned resources or property.

(2) The agency can show that the initiation or increase of fees or charges is not feasible without earmarking of receipts.

(3) The receipts are in payment of the cost of authorized special benefits for which the demand is irregular or unpredictable, such as inspections performed upon request outside the regular duty hours.

This Circular is not intended to change the present system of sharing with States and counties receipts from the lease of certain lands and the sale of certain resources.

6. *Changes is existing law.* In cases where collection of fees and charges for services or property in accordance with this Circular is limited or restricted by provisions of existing law, the agencies concerned will submit appropriate remedial legislative proposals to the Bureau of the Budget under the established clearance procedure, as provided in Bureau of the Budget Circular No. A-19.

7. *New activities.* In the establishment of new Federal activities which would provide special benefits, the agencies concerned are to apply the policies and criteria set forth in this Circular.

8. *Reports to the Bureau of the Budget.* Each agency shall make a report by December 31, 1959, for each bureau or comparable organizational unit, of the costs and charges for all services or property covered by this Circular, and shall also make a report of changes not later than December 31 of each succeeding year as a result of its annual review of such costs and charges. The initial report for any new agency hereafter established (including those established by reorganization) shall be submitted on December 31 following the end of the first fiscal year during which the agency was in operation. Each report shall cover the situation as of the preceding June 30, and shall be prepared in accordance with the instructions set forth in the attachments to this Circular.

By direction of the President:

MAURICE H. STANS
Director

Attachments

ATTACHMENT A
CIRCULAR No. A-25

INSTRUCTIONS FOR THE PREPARATION OF ANNUAL REPORTS ON USER CHARGES

1. *Form and coverage of reports.* Reports shall be prepared on Standard Form No. 4, as illustrated in Attachment B. An original and two copies will be required.

The initial report should represent a complete inventory of all services of the agency which provide a special benefit to recipients above and beyond those accruing to the public at large, and all activities under which federally owned resources or property are or could be sold or leased.

Subsequent reports covering the annual review of costs and charges shall cover only (a) services and activities not reported earlier; (b) services and activities for which charges have been changed; and (c) services and activities for which changes in the applicable category (as described below) have taken place.

2. *Preparation of Standard Form No. 4.*

a. A separate form will be prepared for each of the following categories, where applicable:

(1) Special services for which existing charges are producing full cost recovery; and lease or sale activities which are returning fair market value.

(2) Special services for which existing charges are producing less than full cost recovery; and lease or sale activities for which less than fair market value is being obtained.

(3) Special services and activities for which no charges are currently being made, and for which charges are apparently required by the provisions of this Circular.

(4) Special services and activities for which no charges are to be made in accordance with the policy guidelines and exceptions provided in this Circular.

(5) Services and activities which have been discontinued or transferred to other agencies since the previous report. (This category is not applicable to the initial report.)

The category of items covered by each form will be identified in the heading by placing an "X" in the box corresponding with the number of the category as shown above. Forms need not be submitted for categories in which there is nothing to be reported.

b. Columns on the form will be completed as follows:

(1) Enter the identification number for the service or activity. Each service and activity shall be assigned an indentification number which shall be retained from year to year, to facilitate identification in future annual reports. Agencies may devise their own coding systems for this purpose.

(2) List each special service provided under a heading "Special services", and each lease or sale activity under a heading "Lease or Sale."

(3) Enter the unit for measuring the service or property provided.

(4) Enter the amount of the charge being made for each unit as of the preceding June 30. In cases where there are various rates for differing situations, a summary schedule of rates may be attached in lieu of listing each rate individually.

(5) Enter the date the charge shown in column 4 became effective.

(6) Enter the amount of the charge which was made previous to the date in column 5.

(7) Enter the number of units of activity for the last completed fiscal year.

(8) Enter (in thousands of dollars) the cost of providing the service or the fair market value of resources or property sold or leased.

(9) Enter (in thousands of dollars) the amount of collections (net of refunds) during the last completed fiscal year.

(10) Enter the symbol of the receipt account, appropriation account, or fund account (excluding deposit funds) to which the collections were or will be credited.

(11) Enter any pertinent explanatory comments relating to the information shown in the preceding columns. On reports covering categories 2, 3, and 4, specifically note in this column, for each item, the reason(s) that full cost recovery or fair market value is not obtained. Also indicate whether full cost recovery for special services or fair market value for lease and sale activities can be obtained under existing law; the status of specific legislative proposals (e.g., under study, drafted, cleared, introduced, or reported); and the status of proposed administrative changes in fees and charges, including effective dates.

On reports subsequent to the initial report, indicate in this column the previous category in which the item was reported. On reports covering category (5), identify the services and activities transferred to other agencies or organizational units and the agency or organizational unit to which the transfer was made.

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Title V of the Independent Offices Appropriations Act

§ 483a. Services as self-sustaining; uniformity; regulations; deposit in Treasury; effect on other laws.

It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. (Aug. 31, 1951, ch. 376, Title V, § 501, 65 Stat. 290.)

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Clay Broadcasting Corporation **v.** ***United States of America and Federal Communications Commission,*** **464 F.2d 1313 (5th Cir. 1972) included as Appendix A to Petitioner's Petition for a Writ of Certiorari.**

New England Power Company **v.** ***Federal Power Commission,*** **467 F.2d 425 (D.C. Cir. 1972) included as Appendix D to Petitioner's Petition for a Writ of Certiorari.**

National Cable Television Association, Inc. **v.** ***United States of America and Federal Communications Commission,*** **No. 24,786, (C.A.D.C.), decided April 17, 1973."**

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

American Telephone and Telegraph Company (hereinafter AT&T) and United States Independent Telephone Association (hereinafter USITA) move pursuant to Rule 42 of this Court for leave to file a brief amici curiae in the above entitled proceeding. Petitioner has refused to consent to the filing of such brief.

INTEREST OF AMICI

AT&T and the Independent Telephone Companies represented by USITA have a very substantial financial stake in the outcome of this proceeding as evidenced by the amount of fees which they must pay pursuant to the fee schedule here at issue. For example, the fees paid by AT&T and the associated operating companies in the Bell System amounted to approximately $76,500 in 1969. In 1971, the first full fiscal year during which the present fee schedule was in effect, the amount of such fees

paid by the Bell System increased to approximately $4,200,000. Moreover, in a current rulemaking proceeding, 38 F.C.C.2d 587 (1972), the Federal Communications Commission proposes another boost of approximately 100% in those fees applicable to common carriers which would have the effect of increasing amounts paid by the telephone industry by millions of dollars annually.

The standing of the amici to assert these interests is clear. AT&T is the parent company of the Bell System. The principal business of AT&T and its subsidiaries which make up the Bell System is that of furnishing telecommunications services, mainly telephone service, throughout the United States, except Alaska and Hawaii. AT&T operates a network of cable, wire and radio circuits and related equipment to provide for interconnection among the communications systems of its telephone subsidiaries and other communications systems in the United States and for interconnection with those in most other countries throughout the world.

USITA is the trade association which represents the independent or non-Bell segment of the United States telephone industry. The Independent Telephone Companies provide communications services throughout slightly more than half the geographical service area of the United States, including Alaska and Hawaii. Through interconnection with the Bell System nationwide network the Independent Telephone Companies provide nationwide and worldwide communications services to their customers in the areas which they serve.

With respect to their interstate and foreign communications services, AT&T and the Independent Telephone Companies are regulated as common carriers by the Federal Communications Commission and like petitioner are subject to the Commission's rules relating to fees, 47 C.F.R. §§ 1.1101-1.1120, which are presently before this Court for review.

Although the challenge to the Commission's fees has been presented from the point of view of the CATV industry, the resolution of the issues involved requires an examination of the broader legal questions with respect to the extent of the Commission's authority to impose fees and the statutory criteria to which it must adhere in the setting of fees. The legal principles

involved are not limited to those rules which establish the fees applicable to the CATV industry but extend to the entire fee schedule including those fees applicable to AT&T and the Independent Telephone Companies.

AT&T and USITA believe that there are issues which they intend to present to this Court which will not be sufficiently addressed by petitioner who, it is anticipated, will concentrate on those issues which pertain to the special position of the CATV industry and in particular to the annual or subscriber fees imposed solely on the broadcast and CATV industries. Any decision which this Court may reach in the instant proceeding will of necessity have a significant impact on AT&T and the independent Telephone Companies in that the questions of law which will be resolved will affect the validity of the Commission's entire schedule of fees.

WHEREFORE, it is respectfully requested that AT&T and USITA be granted leave to file the annexed brief amici curiae in the above entitled proceeding.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

BRIEF AMICI CURIAE OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

American Telephone and Telegraph Company (hereinafter AT&T) and United States Independent Telephone Association (hereinafter USITA) submit this brief as amici curiae in support of the position of petitioner herein. The interest of the amici has been stated in the motion accompanying this brief.

PRELIMINARY STATEMENT

This proceeding stems from the adoption by the Commission in 1970 of a new fee schedule which represented a radical departure from its previous practices in this area. The Commission's stated objective was to fix fees which would yield revenues approximating its total annual appropriation. The initial impact of the new schedule was to increase the amount of fees paid by the Bell System more than fifty-fold.

Prior to its action in 1970 the Commission had established its fees on the basis of a more limited objective. Its initial schedule, which had been adopted in 1963, fixed nominal fees for various applications made to the Commission. Report and Order, 34 F.C.C. 811. These fees produced revenues equal to approximately 25 percent of the Commission's annual appropriation. Although this schedule of fees was subsequently amended, the ratio of fee revenues to the annual appropriation remained approximately the same until 1970. See Report and Order, 23 F.C.C. 2d 880 at 881 (1970).

The validity of the Commission's first schedule of fees was upheld by the United States Court of Appeals for the Seventh Circuit which found that the Commission had not acted arbitrarily or in excess of its authority in establishing the nominal fees there in question. *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965).

In 1970 the Commission issued a Notice of Proposed Rule Making, 21 F.C.C.2d 502, setting forth a new schedule of fees which for the first time was designed to produce revenues approximately equivalent to the Commission's total annual appropriation. In response to the Notice of Proposed Rule Making, *supra*, numerous parties, including amici herein, filed comments with the Commission which raised substantial questions as to the Commission's authority to impose fees of this nature.

In its Report and Order released July 2, 1970, 23 F.C.C.2d 880, the Commission disposed of the legal challenges to its authority and adopted the schedule of fees presently before this Court for review.* In so doing the Commission stated that its action was fully authorized by applicable statutes and executive guidelines and in accord with the views of Congressional committees which had urged it to adopt fees which would make it more fully self-sustaining. In order to achieve its goal of recovering its total annual appropriation through fee

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* Minor modifications in the fee schedule were made by the Commission in its Memorandum Opinion and Order, 28 F.C.C.2d 139 (1971).

revenues, the Commission increased fees already in existence, instituted new fees including grant fees to be paid in addition to filing fees upon the granting of applications, adopted a schedule of fees for the CATV industry and introduced annual fees for the CATV and broadcast industries.* The impact of the new fee schedule upon those subject to it was substantial. The fees paid by AT&T and other companies of the Bell System, for example, increased from approximately $76,500 in 1969 to approximately $4,200,000 in 1971, the first full fiscal year during which the new fee schedule was in effect. In fiscal year 1972 the fees paid by the Bell System amounted to $3,490,000.

The petitioner herein and other interested parties appealed the Commission's order adopting its new schedule of fees in the United States Court of Appeals for the Fifth Circuit. In *Clay Broadcasting Corp.* v. *United States*, 464 F.2d 1313 (5th Cir. 1972), the court upheld the validity of the fee schedule in all respects stating that the Commission had not exceeded or abused its statutory authority. This Court has now agreed to review that decision. AT&T and USITA as amici curiae urge that this Court reverse the decision below to the extent that it upholds the Commission's authority to impose fees to recoup the costs of Commission activities which are unrelated to the cost of rendering special services to identifiable recipients.

SUMMARY OF ARGUMENT

AT&T and USITA show in this brief amici curiae that in adopting the schedule of fees here in question the Commission has acted in excess of its authority. By examining the language and legislative history of the statutory provisions relied on by the Commission, the executive guidelines issued to implement those provisions, and the relevant case law, it is shown that Congress has not delegated to the Commission the authority to impose the fees here at issue which are designed to produce

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* Petitioner erroneously states at page 9 of its Petition for a Writ of Certiorari that an annual fee was imposed upon common carriers.

revenues equivalent to the Commission's entire annual appropriation and which are thus greatly in excess of the costs attributable to the performance of special services which benefit identifiable recipients.

ARGUMENT

IN ESTABLISHING THE SCHEDULE OF FEES HERE IN QUESTION, THE FEDERAL COMMUNICATIONS COMMISSION HAS EXCEEDED THE AUTHORITY DELEGATED TO IT BY CONGRESS

In its Report and Order of July 2, 1970, 23 F.C.C.2d 880, the Commission cites as legal authority for the adoption of the fee schedule here in question, Title V of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a) and Bureau of the Budget Circular A-25, the same authorities relied upon in the adoption of its prior fees. These authorities, however, do not support the Commission's position, nor can such support be found in the Commission's reference to statements of the Bureau of the Budget and Congressional committees which are said to have expressed the view that the Commission should adopt fees which would make it either fully self-sustaining or more nearly so. Although the Commission explains that the fee schedule which it has adopted ". . . has been prepared in the light of these executive and congressional directives . . ." (23 F.C.C. 2d at 881) its reliance on these "directives" is clearly misplaced. They do not have the force of law and cannot be relied upon as authority for the adoption of fees which are inconsistent with the controlling statutory language of Title V.

A. Title V of the Independent Offices Appropriations Act of 1952

Title V of the Independent Offices Appropriations Act of 1952, provides in pertinent part:

> "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate,

> registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: . . ."*

The above language of Title V makes it amply clear that it is only the enumerated services and similar services for which fees may be set and which Congress directed to be self-sustaining to the full extent possible. The statute does not state that an agency which performs any of the enumerated services may impose fees which would make the agency's total operations self-sustaining to the full extent possible. Indeed if that had been the intent of Congress it would have expressly so stated.

The legislative background of Title V offers evidence that Congress did not intend to authorize the assessment of fees designed to enable agencies to recover the full cost of all their activities. The Report of the Senate Committee on Expenditures in the Executive Departments, S. Rep. No. 2120, 81st Cong., 2d Sess. (1950) issued a year before the passage of Title V, examined the advisability of establishing fees for governmental services rendered for special interests. The Report stated:

> ". . . The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the Federal budget as non-reimbursable by transferring the financial burden thereof to the special beneficiaries. Thus, at the outset, it is desired to draw a clear line of distinction between serv-

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* The full text of Title V is reproduced at pages 3-4 of the Petition for a Writ of Certiorari in this proceeding.

> ices which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large." (S. Rep. No. 2120, 81st Cong., 2d Sess. 1.)

In its conclusions the Committee emphasized this distinction between special services for which it recommended the imposition of fees and those services benefiting the general public for which no fees should be imposed by stating that in its staff reports the position has been maintained that:

> ". . . there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large." (S. Rep. No. 2120, 81st Cong., 2d Sess. 3.)

The Committee further stressed its intention to recommend fees for only those special services which benefit identifiable recipients by stating that where an identifiable recipient and the general public jointly benefit by the performance of a particular service, the cost of that service should be equitably divided between the beneficiary and the public and by taking the position that where there is doubt as to the degree or preponderance of the benefit no fee should be imposed. Thus the Report states:

> ". . . there is no doubt, however, that, of the 12 agencies included in this study, some render services the benefits of which accrue wholly to special interests which derive therefrom the means of financial success. The committee does incline to the view that, in such instances, the cost to which the Government is put should be borne by the beneficiaries. Where there is joint benefit to a particular beneficiary and to all of the people, the cost should be equitably divided, and where there is doubt as to the degree or preponderance of benefit, there should be no fee." (S. Rep. No. 2120, 81st Cong., 2d Sess. 3.)

Similarly the House Committee on Appropriations in its report accompanying the bill to which Title V was a rider stated

that "The Committee is concerned that the Government is not receiving full return for many of the services which it renders to special beneficiaries. . . ." (H.R. Rep. No. 384, 82d Cong., 1st Sess. 2 (1951).) By stating its concern in terms of the return obtained by the Government for services rendered for special beneficiaries, the Committee clearly indicated that in its view the purpose of Title V was to authorize the imposition of fees for such special services and not to transform the basic method of funding governmental agency operations by authorizing the imposition of fees designed to make an agency fully self-sustaining.

Thus the plain language of Title V as well as the legislative intent expressed by Congress in the reports cited demonstrate that that Title may not be relied upon as authority for the imposition of fees for services other than those which benefit identifiable recipients.

B. Bureau of the Budget Circular A-25

Bureau of the Budget Circular A-25 issued on September 23, 1959, pursuant to the provisions of Title V, sets forth guidelines for the implementation of that title.* In the Circular the Bureau of the Budget expressly recognizes the distinction between those services which an agency performs for an identifiable beneficiary and those which benefit the general public and provides that charges should be imposed only for the former category of services. Section 3a(1) of the Circular states:

> "Where a service (or privilege) provides special benefits to an identifiable recipient *above and beyond those which accrue to the public at large,* a charge should be imposed to recover the full cost to the Federal Government of rendering that service . . . ." (Emphasis added)

In order to describe the kinds of services for which fees may be imposed, the Circular lists certain examples which would be

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* The full text of the Circular is reproduced in Appendix C of the Petition for a Writ of Certiorari in the instant proceeding.

covered: receiving a patent, crop insurance, or a license to carry on a specific business (3a(1) (a)); certificates of necessity and convenience for airline routes, or safety inspections of craft (3a(1) (b)); or receiving a passport, visa, airman's certificate, or an inspection after regular duty hours (3a(1) (c)). All of the examples given are of particular services to identifiable recipients, and it is plain that the Bureau of the Budget contemplated fees which would recover no more than the cost of such services.

To provide additional guidance to the agencies implementing Title V, the Circular sets forth in Section 3a(2) the following criteria for identifying those services for which no charge should be made:

> "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public . . . ."*

In order to establish that fees adopted pursuant to Title V must be directly related to the cost of providing a special service, Section 5b of the Circular states:

> ". . . The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient. . . ."

Thus it is clear that although Title V provides that in setting fees an agency, in addition to considering the direct and indirect costs of providing the special service, should take into consideration the value conferred on the recipient and the public policy or interest served, that agency may not in reliance on the latter considerations adopt fees which produce revenues in excess of the costs of providing the service. The purport of Title V and the Circular is rather that if the cost of providing a special service is great and at the same time the value to the recipient

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*This provision of the Circular is in accord wth the position taken by the Senate Committee on Expenditures in the Executive Department in S. Rep. No. 2120, 81st Cong., 2d Sess. 3 (1950) quoted at page 9, *supra*.

is relatively small, the agency may in the interest of equity or public policy adopt fees lower than those required to recover the total cost of performing the service.

Because many of the Commission's services and activities do not confer special benefits upon those required to pay fees, the Commission's adoption of fees designed to recover the entire cost of administering the agency has of necessity violated the provisions of the Circular.

C. The Commission's Fee Schedule Improperly Imposes Fees Unrelated to the cost of Special Services Performed for the Benefit of Those Persons Required to Pay Such Fees

In its Supplemental Notice of March 4, 1970, 23 F.C.C.2d 183, the Commission described the process employed by it in arriving at its schedule of fees. That process involved identifying the direct and indirect costs of operating each of its bureaus and offices and thereafter distributing among them its remaining costs not directly attributable to any particular service. Fees were then developed for each service sufficient to produce revenues approximately covering the total costs thus allocated to the bureau or office performing that service.

As can be seen from the Supplemental Notice, *supra,* the Commission did not attempt to determine which of its services or activities redound to the benefit of identifiable recipients and which primarily benefit the general public. The sole object of the Commission was to develop fees which would generate revenues equivalent to the total cost of administering the agency. The setting of fees in this manner is clearly beyond the authority granted by Title V and is contrary to the guidelines of Bureau of the Budget Circular A-25.

It cannot be disputed that many of the services and activities of the Commission are performed for the benefit of the general public rather than for the benefit of special interests. Such activities include various rulemaking and investigatory proceedings, spectrum management studies, activities relating to emergency communications, participation in international confer-

ences, participation in joint industry and government advisory committees, activities of the Common Carrier Bureau trial staff in representing the public interest in common carrier rate proceedings as well as disposing of numerous complaint and other adjudicatory proceedings all of which benefit the public as a whole. To the extent that the Commission fees are designed to reimburse the Government for costs arising from the provision of such services which are performed for the benefit of the public at large, their adoption is beyond the authority delegated to the Commission by Congress.*

In yet another respect the fees set by the Commission are based on costs which are unrelated to the provision of services of benefit to identifiable recipients. Under the fee schedule such communications services as local government, police, fire and other emergency radio services (see Subpart G, Part I of Chapter I, 47 C.F.R. § 1.1115(c) for list of exemptions) as well as numerous complaint and other adjudicatory proceedings are exempt from the payment of fees. Under the Commission's fee setting approach the cost of providing services for these exempt classes is borne by those who are not exempt and who thus are required to pay fees which exceed the cost of providing the services of which they themselves are the beneficiaries. If pursuant to the provisions of the Circular fees may not be imposed for services when the ultimate beneficiary is obscure, *a fortiori* fees may not be imposed for special services rendered for the benefit of readily identifiable recipients other than those who are obliged to pay the fees. Likewise the provisions of the Circular are violated in that the maximum fees to be paid by the non-

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* Because it was not the intention of Congress to authorize the imposition of full recovery fees, there are no statutory guidelines to assure that the fee burden is rationally and equitably distributed among those regulated by the Commission. Thus under the fee schedule here in question the grant fee paid in 1973 by AT&T for its Long Lines Department's "blanket" construction application amounted to $2,100,882 or more than 25% of the costs allocated to the Common Carrier Bureau for fiscal year 1974. No rational justification appears for imposing a fee of this magnitude for the grant of one application.

exempt classes are not governed by the cost of providing those particular services which benefit them rather than other identifiable interests.

Thus in determining that the costs for special services which are exempt from fees must be met by fees paid by those receiving other services which are not exempt, the Commission has exceeded its statutory authority. Neither Title V nor the Circular authorizes the imposition of such fees. Although the Commission may within its discretion determine that it is in the public interest for certain classes of applicants to be either exempt from the payment of fees or permitted to pay fees which are not sufficient to meet the costs of providing services to them, the costs incurred in the provision of such services should not be met by fees collected from those who are not exempt.

By setting fees which are great enough to cover services performed for the general public or for classes of applicants exempted from the payment of fees, the Commission has crossed the boundary between the assessment of fees and the assessment of taxes. It is evident from the language of both Title V and the Circular which ties the fees authorized to something of "value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . ." that Congress and the Bureau of the Budget were giving recognition to the fundamental legal distinction between a fee and a tax. A "fee" must bear a reasonable relationship to the extent and nature of services rendered or benefits conferred which are in excess of those that accrue to the public generally. *Hanson* v. *Griffiths*, 124 N.Y.S.2d 473, 476, 204 Misc. 736 (Sup. Ct. Westchester Co. 1953), *aff'd*, 127 N.Y.S.2d 819, 283 App. Div. 662 (2nd Dep't. 1959); *Smith* v. *Carbon County*, 90 Utah 560, 63 P.2d 259, 262, 108 A.L.R. 513 (Sup. Ct. 1936). The test of the reasonableness of a license fee is that it shall be no greater than is sufficient to cover the expenses of administration. *Meyers* v. *Matthews*, 270 Wis. 453, 71 N.W.2d 368 (Sup. Ct. 1955), *appeal dismissed*, 350 U.S. 927, *rehearing denied*, 350 U.S. 977 (1956). See also *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 210-11 (1944). Thus to the extent that the

Commission's fee schedule is designed to produce revenues in excess of the cost of rendering the special services, benefits and other things of utility to particular recipients, they constitute a tax to be used to fund those activities of the Commission designed to benefit those recipients of special services who are exempt from the payment of fees and those activities of the Commission designed to benefit the general public. Congress has not delegated to the Commission the authority to impose such a tax.

D. Court Decisions Interpreting Title V of the Independent Offices Appropriations Act and Bureau of the Budget Circular A-25 Do Not Support the Decision of the Court Below

The court decisions which have interpreted the provisions of Title V and the Circular fail to support the holding of the court below. Both the Commission and the court below rely upon *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) in support of the proposition that fee revenues need not be limited by the cost of administering particular services. The *Aeronautical* case does not, however, stand for this proposition. In that case the court upheld the Federal Communications Commission's authority to impose nominal fees for the granting of certain licenses. The validity of fees amounting to the Commission's entire annual appropriation and greatly in excess of the cost of issuing those licenses was not in question. — *Aeronautical* stated that it was within the Commission's discretion to balance the statutory criteria for setting fees, *e.g.*, cost of administration, value to the recipient and public interest served, and to allocate to each the weight which it sees fit. However, the court did not state that in balancing these criteria the Commission could ignore the statutory limitations of Title V and the guidelines of the Circular.

The decision of the court below reflects a fundamental misapplication of the law which requires the rejection of its hold-

ing. That court held that the general regulatory activities of the Commission which do not confer a special benefit, service or thing of utility on a specific recipient are the sorts of activity for which fees may lawfully be imposed.

> ". . . The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. We therefore are unable to find that the Commission acted unreasonably or arbitrarily in imposing on commercial licensees an annual fee which is part of a schedule calculated to fully recover the direct and indirect costs of regulating the broadcast industry." (464 F.2d 1313 at 1318)

Even the most casual reading of Title V and the Circular indicates that it is just this sort of general function for which the identification of the ultimate beneficiary is obscure and for which fees are not authorized.

Having misconstrued the nature of the fees authorized by Title V, the court summarily disposed of the provisions of the Circular by stating:

> ". . . Bureau of the Budget Circular A-25 which provides 'The maximum fee for a special service will be governed by its total cost and not by the value of the service to the recipient' does not compel the Commission to precisely pro-rate its costs in performing the various services in the Broadcast Bureau and limit the fee for each service to its precise administrative cost. Indeed such precision would be difficult if not altogether impossible to achieve." (464 F.2d 1313 at 1317-18)

As can be seen this does not meet the question of whether the Commission may lawfully impose fees which are intended to yield revenues in excess of the total cost of performing the special services for which fees may be imposed. The court went on to state, in effect, that the explicit cost limitation provi-

sions of the Circular may be disregarded and that the value to the recipient alone may be relied upon in setting fees. Although the language of the Circular is unambiguous, the court offered no rationale or justification for choosing not to abide by its clear mandate.

Subsequent to the decision of the court below the United States Court of Appeals for the District of Columbia rendered its decision in *New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425 (D.C. Cir. 1972). On May 14, 1973, this Court agreed to review that case, 41 U.S.L.W. 3605. In *New England Power Co., supra,* the court struck down the annual fees imposed on the natural gas pipeline and electric industries by the Federal Power Commission. These fees were to make the administration of Parts II and III of the Federal Power Act self-sustaining by assessing those costs not met by filing fees against jurisdictional companies in accordance with a formula. As statutory authority for the imposition of its fees, the Federal Power Commission like the Federal Communications Commission relied on Title V.

In the *New England Power Co.* case, the court engaged in a careful analysis of Title V and the Circular in arriving at its decision to strike down the Power Commission's annual fees. The court held that the maintenance of an "economic climate" (closely akin to the "market structure" mentioned by the court below) is not a "special service" for which the law permits the imposition of a fee.

> ". . . The creation of an 'economic climate' is not a special service nor is a particular pipeline or gas company the 'special beneficiary' of such a climate any more than any other pipeline, gas company or the consumer in general. Indeed, under the Commission's order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. . . ." (467 F.2d 425 at 429)

The court stated that the contemplated charges are unrelated to specific services or benefits rendered and that the maintenance of an "economic climate" is an:

> ". . . overly broad benefit particularly in light of the requirement that the charges be for a 'measurable unit of service.' Furthermore, the statutory language—'to or for any person'—as well as the Budget Circular require an identifiable recipient. . . ." (467 F.2d 425 at 429)

The court concluded that those activities of the Commission which benefit the general public should be supported from the general fund of the treasury and that Congress had not authorized the levying of fees for such activities.

> "In sum, we conclude that the regulation of these industries is primarily for the benefit of the public. Their charter statutes require them so to act. The courts have so held. There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, *we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.*" (467 F.2d 425 at 429) (Emphasis added.)

The conflict between the holding of the court below and that of the court in the *New England Power Co.* case is evident. AT&T and USITA as amici curiae believe that the decision of the court in *New England Power Co.* is fully supported by the language of Title V, its legislative history and by the language of the Circular and further believe that the court below in failing to analyze Title V and its executive guidelines arrived at a decision which is not legally supportable. It is therefore urged that this court resolve the conflict in the circuits by concurring in the reasoning of the court in the *New England Power Co.* case.

CONCLUSION

For all of the foregoing reasons it is respectfully requested that this Court reverse the decision of the court below to the extent that it upheld the validity of Commission fees which are unrelated to the cost of providing special services to identifiable beneficiaries and thus not authorized by Title V of the Independent Offices Appropriations Act and Bureau of the Budget Circular A-25.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (hereinafter NAB) moves pursuant to Rule 42 of this Court for leave to file a brief *amicus curiae* in the above entitled proceeding. NAB has received permission to file such a brief from both the Solicitor General of the United States and the Federal Communications Commission although Petitioner, National Cable Television Association, Inc., has refused consent to this filing.

NAB is a non-profit organization of radio and television broadcasters whose membership as of July 18, 1973, includes 1,378 FM stations, 2,269 AM stations and 534 television stations. The objective of the NAB, in accordance with its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

The commercial broadcast services are subject to the Federal Communications Commission (hereinafter Commission or FCC) rules relating to fees, 47 CFR §§ 1.1101-1120,[1] 23 F.C.C.2d 880 (1970),[2] as modified in 28 F.C.C.2d 139 (1971),[3] presently before this Court for review.

NAB respectfully submits that the challenge to the schedule of fees as presented by the National Cable Association, Inc., Petitioner, will not adequately reflect the positions of the NAB respecting the fundamental legal authority upon

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[1] For text, *see* Petitioner's Brief for Certiorari at app. B, 21-9, Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313 (5th Cir. 1972), *cert. granted sub nom.* National Cable Television Ass'n v. United States, ___ U.S. ___, 36 L Ed.2d 957, 93 S. Ct.___ 1973.

[2] For text, *see Id.* at app. B, 1-21.

[3] For text, *see Id.* at app. B, 33-59.

which the Commission's annual fees affecting commercial broadcasters are premised. Whereas it is anticipated that Petitioner will concern itself only with fees assessed against the CATV industry, NAB requests this opportunity to be heard in opposition to the substantial annual fees imposed upon the commercial broadcast industry.

In keeping with its above stated objectives, the NAB herein seeks to protect its members from the unjust imposition upon all commercial broadcasters of an unreasonable and arbitrary annual assessment for the privilege of participating in the broadcasting industry. NAB is not opposed to the basic objective of collecting fair and equitable fees. It is our belief, however, that the scope, form and asserted legal basis for the annual fees imposed by the Commission are without merit. In particular, we shall show that the FCC has taken great liberties with the powers delegated to it by the Congress and has wrongfully disregarded the standards and guidelines set forth in the statute and associated directive upon which the contested fees were predicated: Title V of the Independent Offices Appropriations Act[4] and Bureau of the Budget Circular No. A-25.[5] In authorizing federal agencies to render themselves "self-sustaining to the full extent possible" the enabling statute and directive intentionally limit the imposition of "reasonable" charges to "each identifiable recipient for a measurable unit or

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[4] 31 U.S.C. § 483(a) (1971). For pertinent portion, *see* Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313, 1315-16 n. 2 (5th Cir. 1972), *cert. granted sub nom.* National Cable Television Ass'n v. United States, ___ U.S. ___. 36 L Ed.2d 957, 93 S. Ct. ___ (1973).

[5] For text, *see* Petitioner's Brief for Certiorari, *supra* at app. C.

amount of Government service or property from which he derives a special benefit." In adopting annual fees for commercial broadcasters, NAB submits that the FCC exceeded those parameters by devising fees predominantly directed toward enabling the Commission to recover the full amount of its annual Congressional appropriation. Any decision by this Court in this proceeding will, of necessity, affect significantly the interests of the NAB and commercial broadcasters to the extent that such a decision determines the validity of the Commission's action in imposing the contested annual fees.

WHEREFORE, in view of the significance of this matter, the NAB respectfully requests that it be granted leave to file the annexed brief *amicus curiae* in the above entitled proceeding.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTEREST OF AMICUS

The National Association of Broadcasters (hereinafter NAB) submits this brief *amicus curiae* in support of the Petitioner herein. The interest of amicus NAB has been stated in full in the accompanying *Motion for Leave to File Brief Amicus Curiae.*

PRELIMINARY STATEMENT

On February 19, 1970, the Federal Communications Commission (hereinafter Commission or FCC) issued a *Notice of Proposed Rule Making*[1] which set forth a new schedule of fees designed to recover the full amount of the Commission's annual Congressional appropriation. The Commission had previously maintained a schedule of fees, first adopted in 1963,[2] which provided for the assessment of nominal filing fees, approximating 25 percent of its annual appropriation. The validity of those nominal fees was established in *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965).

The new schedule proposed in 1970 was designed to apply to all of the communications services regulated by the Commission.[3] Following a period for submission of Comments and Reply Comments, the Commission, on July 2, 1970, released its *Report and Order*,[4] adopting

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[1] 21 F.C.C.2d 502 (1970).

[2] *Report and Order* in Docket No. 14507, 34 F.C.C. 811 (1963).

[3] For the 1971 fiscal year the FCC calculated that 38.8% or $9,661,200 of its total budget of $24,900,000 was to be collected from the broadcast services. *Supplemental Notice*, 23 F.C.C.2d 183 (1970).

[4] 23 F.C.C.2d 880 (1970), *modified*, 28 F.C.C.2d 139 (1971). The schedule of fees, Rules and Regulations of the Federal Communications Commission, 47 C.F.R. §§1.1101-1120, is reproduced in full in Petitioner's Brief for Certiorari at app. B, Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313 (1972), *cert. granted sub nom.* National Cable Television Ass'n. v. United States, ___ U.S. ___, 36 L Ed.2d 957, 93 S Ct. ___(1973).

the fee schedule under consideration in this case. Existing filing fees for commercial broadcasters were substantially raised and new fees were initiated. Principal among the latter, was the establishment of an annual fee amounting to "24 times a radio station's highest one-minute spot announcement rate, but not less than $52, and 12 times a television station's highest 30-second spot announcement rate, but not less than $144."[5] These annual fees are singled out in this brief because they are most clearly violative of the criteria governing the imposition of fees by Federal agencies.

In response to the July *Report and Order* a number of Petitions for Reconsideration were filed before the Commission. The FCC replied with its *Memorandum Opinion and Order* of August 1, 1971,[6] which essentially retained the fees directed against broadcast services as contemplated in the July 2nd order.

The impact of the new fees was not inconsiderable and there ensued a number of individual challenges to the Commission's authority in adopting the new schedule of fees. Those proceedings were consolidated in the United States Court of Appeals for the Fifth Circuit. That court rendered its decision in *Clay Broadcasting Corp. of Texas v. United States*, 464 F.2d 1313 (5th Cir. 1972), sustaining the validity of the fee schedule in all respects. Thus that court held that the Commission had not exceeded or abused its

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[5] Clay Broadcasting Corp. of Texas v. United States, 464 F.2d 1313, 1317 (1972), *cert. granted sub nom.* National Cable Television Ass'n. v. United States, ___ U.S. ___, 36 L.Ed.2d 957, 93 S. Ct. ___(1973).

[6] 28 F.C.C.2d 139 (1971).

statutory authority to devise charges or fees so as to enable the agency to become "self-sustaining to the full extent possible" pursuant to Title V of the Independent Offices Appropriations Act of 1952 (hereinafter Title V).[7] The Fifth Circuit thus did not find the fees violative of the standards for implementing Title V set forth in Bureau of the Budget (now Office of Management and Budget) Circular No. A-25[8] limiting federal agencies to the imposition of "reasonable" charges to "each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit."

NAB submits that in adopting the new fee schedule fashioned to enable the Commission to recover the full amount of its annual Congressional appropriation, the FCC did, in fact, exceed the restrictive parameters of Title V and the Budget Circular. Thus, NAB respectfully urges this Court to reverse the decision of the Fifth Circuit and invalidate the Commission's annual assessment against commercial broadcasters as a wrongful attempt to recoup the costs of Commission activities which are of benefit to the public generally and do not constitute special services inuring to the benefit of identifiable recipients.

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[7] 31 U.S.C. §483(a) (1971). For pertinent language, *see* 464 F.2d at 1315-16 n.2.

[8] For text, *see* Petitioner's Brief for Certiorari, *supra* at app. C.

ARGUMENT

I. THE LOWER COURTS ARE IN CONFLICT AS TO THE PROPER INTERPRETATION OF TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT.

Shortly after the *Clay* decision, *supra*, the United States Court of Appeals for the District of Columbia Circuit handed down its decision in the case of *New England Power Co. v. Federal Power Commission*, Cases No. 71-1439, 71-1539, 71-1555.[9] The *New England Power Co.* case, like the FCC case, concerned the validity of certain annual fees assessed against participants of the regulated industry. In both cases the contested fee schedules were premised upon the same statutory directives and executive guidelines. Contrary to the ruling of the Fifth Circuit, however, the United States Court of Appeals for the District of Columbia Curcuit held that the Federal Power Commission (hereinafter FPC) was in violation of the enabling legislation and executive guidelines in imposing its annual charges. Amicus NAB believes that the reasoning applied by the court in the *New England Power Co.* case reinforces the alleged impropriety of the Fifth Circuit decision.

Both cases concerned the adoption of annual fees or charges pursuant to the authority granted to Federal agencies under Title V to recoup certain of their operating costs. Title V provides, in part:

> It is the sense of the Congress that any work, service, . . . benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted, . . .

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[9] 467 F.2d 425 (D.C. Cir. 1972).

> by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible . . .[10]

Accordingly, Federal agencies are permitted to prescribe "fair and equitable" fees or charges against participants in their respective regulated industries. In setting the fees, however, the agency is directed to "consider direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . . "

In their review of these factors the two courts of appeals differed sharply in construing the concept "value to the recipient;" their final decisions largely turn on the breadth or narrowness attributed to that term. In particular, the District of Columbia Circuit adopted a strict or narrow interpretation of the "value to the recipient" concept restricting the recoupment of costs to identifiable special beneficiaries of governmental activities. In contrast, the Fifth Circuit appraised the adoption of the new FCC schedule of fees as a "reasonable exercise of the authority delegated to the Commission by Congress" to become more nearly self-sustaining:

> In addition to levying application fees, the Commission proposed to give explicit recognition to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license. [Footnote omitted.] 464 F.2d 1313, 1316 (5th Cir. 1972).

The standards and guidelines for applying Title V were set forth by the Bureau of the Budget's Circular No. A-25.

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[10] *See* note 7 *supra.*

According to the Circular, as it was described by the District of Columbia Circuit, reasonable charges

> . . . *"should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit."* These services include agency action which "provides special benefits . . . *above and beyond those which accrue to the public at large* . . . ." [Emphasis added]. 467 F.2d at 428.

Thus, the Circular specifies that charges imposed by an agency should be reasonable and they should be made only to identifiable recipients of measurable amounts of Government service from which the recipient derives a special benefit. Furthermore, the Circular stipulates that in no case should a charge be imposed where the "identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." The foregoing language of the Circular is seemingly clear, yet the two courts of appeals, as was the case with defining the term "value to the recipient," reached conflicting conclusions as to the proper utilization of the Circular in reviewing fees predicated upon Title V.

In 1971 the FPC had imposed upon natural gas companies and electric utilities a new schedule of fees, including an annual charge designed to reimburse the FPC for costs of administering certain of its regulatory programs not met by filing fee revenues. The annual charge was described by the FPC as having been

> . . . predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal

> level and the exercise of the powers delegated to them by the Congress . . . . 45 F.P.C. 964, 967 (1971).

A review of the language and legislative history of Title V resulted in the District of Columbia Circuit's finding that such an annual fee was beyond the scope of the agency's fee setting authority:

> As the foregoing legislative history makes clear, Title V was enacted to allow the agency to recoup costs from identifiable "special beneficiaries" where the services rendered inured to the benefit of special recipients not the general public. The statute has been consistently interpreted in this manner by the agencies of the executive branch of Government. [Footnote omitted]. 467 F.2d at 428.

Similarly, the court disallowed the annual fee scheme as violative of the Bureau of the Budget Circular which forbade the levying of charges for services where the "identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public." Quoted in 467 F.2d at 428. The Circuit Court was not persuaded, moreover, by the FPC's assertions that the fees were appropriate compensation for the beneficial economic climate fostered by the Commission's regulatory activities which inured to the benefit of all participants in the industry. To the contrary, the court noted that

> *The creation of an "economic climate" is not a special service nor is a particular pipeline or gas company the "special beneficiary" of such a climate any more*

> *than any other pipeline, gas company or the consumer in general.*
>
> * * *
>
> *In sum, we conclude that the regulation of these industries is primarily for the benefit of the public.* Their charter statutes require them to so act. The courts have so held. (Footnote omitted). There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. [Emphasis added]. *Id.* at 429.

By contrast, the Fifth Circuit affirmed the FCC's annual assessment, despite the similarly remote relationship between services rendered by the Commission and the fees imposed against commercial broadcasters.

In categorical exception to the ruling of the District of Columbia Circuit, the Fifth Circuit adopted an "economic climate" argument as a justifiable basis for imposition of annual fees:

> In exchange [for fees], commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent

> with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. 464 F.2d at 1318.

Thus the Fifth Circuit was unable to find that the Commission had acted unreasonably or arbitrarily in imposing fees designed to fully recover direct and indirect costs of regulating the communications industry.[11]

In sum, the United States Court of Appeals for the District of Columbia found fault with the FPC's attempts to recoup their costs of regulating public utilities via annual charges where such regulation is primarily for the benefit of the public. The Fifth Circuit reached the opposite conclusion; it utilized a more expansive view towards the criterion "value to the recipient."

II. THE FIFTH CIRCUIT ERRED IN AFFIRMING THE FCC FEE SCHEDULE; THE DECISION IS FOUNDED UPON A MISAPPREHENSION OF APPLICABLE LAW

As discussed in the foregoing, the decisions of the two courts of appeals are in apparent conflict regarding the appropriate interpretations and applications of the legislative and executive guidelines authorizing agencies to recoup their Congressional budgets to the fullest extent possible. Amicus NAB respectfully submits that the holding of the District of Columbia Circuit in *New England Power Co.* reflects the more appropriate application of Title V and the associated Budget Circular; appropriate in terms of legislative history and reasonableness.

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[11] 464 F.2d at 1318.

A. The FCC fee schedule goes beyond an appropriate *quid pro quo* exchange of services and benefits between an agency and the industry it regulates.

NAB contends that in devising its new schedule of fees the FCC failed to lend credence to the specific language of the enabling statutes and, as a result, improperly concerned itself with achieving full recovery of the FCC's annual Congressional appropriation. The fee schedule adopted by the Commission, moreover, was apparently premised upon a basic fallacy that regulatory activities are primarily for the benefit of the regulated. Accordingly, for example, the FCC determined that broadcasters should reimburse the Commission the full cost of all activities related to the broadcasting industry. NAB submits that this misapprehension as to the intent and purpose of Title V stems from the Commission's loose interpretation of the "value to the recipient" concept.

NAB contends that the FCC was obligated to base its fee schedule squarely upon Title V and the Bureau of the Budget Circular. Accordingly, an agency is permitted to adopt "fair and equitable" fees which take into account the cost to the Government, the value to the recipient, and the public policy or interest served. Furthermore, such fees must be reasonable and assessed against only identifiable recipients of measurable amounts of government service from which the recipient receives a special benefit. Most importantly, the Budget Circular stipulates that no charges should issue where the "ultimate beneficiary is obscure and the service can primarily be considered as benefitting the public as a whole." As indicated earlier, the Fifth Circuit rejected these arguments as construing in too limited a fashion the guidelines provided by the enabling statute and affirmed the FCC fees:

> . . . the Commission proposed to give explicit recognition to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license. [Footnote omitted]. 464 F.2d at 1316.

In other words, the Commission has focused almost exclusively upon the "value to the recipient" criterion. Assuming, *arguendo*, that it is appropriate for the Commission to focus upon only one of the three explicit statutory criteria and virtually disregard the others, NAB contends the FCC has wholly misconstrued the notion of "value to the recipient."

As evidenced in the *New England Power Co.* case, the legislative history of Title V demonstrates a concern that agencies be permitted "to recoup costs from identifiable 'special beneficiaries' where the services rendered inured to the benefit of special recipients not the general public." 467 F.2d at 428. That court went on to reject the FPC's arguments that the creation of an "economic climate" was a special service which inured to the benefit of the individual regulated industries. *Id.* at 429.

Similarly, NAB suggests the Fifth Circuit erred in adopting the FCC's "economic climate" argument:

> In exchange, commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation . . . maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. 464 F.2d at 1318.

In support of its position NAB submits that the Communications Act of 1934, as amended, makes patently clear that the primary function of the FCC in granting broadcast licenses is not to benefit the licensee, but to insure that the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. §§ 307(a), 309(a). Thus, although the broadcast license enables the licensee to engage in a business which may be economically profitable, in the final analysis it is the public which is the prime and ultimate beneficiary of the broadcasting service.[12]

It is, moreover, the right of the public to be informed that governs the use of broadcast frequencies; so said this

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[12] Former FCC Chairman Hyde made this same point during the following testimony:

> Mr. Hyde: I was going to suggest that we are communications people rather than revenue people.
>
> Mr. Talcott: You are providing them an enormous service, more than $24 million. By protecting the broadcasting industry from CATV, you are certainly rendering a great service.
>
> Mr. Hyde: I would respectfully argue that we are not protecting one industry from another, we are trying to maintain a healthy competitive relationship.
>
> Mr. Talcott: That must be of some value.
>
> Mr. Hyde: It is of value but we don't do it for the benefit of particular industries. *We do it for the overall benefit of the public. Any benefits that accrue to particular applicants are incidental to that.* [Emphasis added].

Hearings before a Subcomm. of the House Comm. on Appropriations, 91st Cong., 1st Sess., pt. 1, at 583 (1969).

Court in *Red Lion Broadcasting Co. v. FCC*[13] and even more recently in *Columbia Broadcasting System, Inc. v. Democratic National Committee.*[14] Surely if the rights of the public govern the use of the electromagnetic spectrum they are the true beneficiaries of the Commission's regulatory activities, not the individual broadcasters. Indeed, this Court described the function of licensees upon using "scarce radio frequencies as *proxies for the entire community* obligated to give suitable time and attention to matters of great public concern."[15] (Emphasis added).

Statements such as these leave little doubt that the regulation of broadcasting undertaken by the Commission is not designed primarily for the benefit of the licensee, but for that of the public. If the public is the ultimate beneficiary of Commission efforts, it follows that many of the activities for which the Commission is assessing fees against licensees cannot be charged. For example, under the "value to the recipient" theory proffered by the FCC, the fees charged commercial broadcasters would encompass FCC budgetary provisions related to management of the Emergency Broadcast System, noncommercial educational broadcast services, and such other assorted activities as research, participation in international conferences, business trips undertaken by FCC Commissioners and staff members, the handling of public correspondence, the processing of rule-making petitions filed by members of the general public and a host of others. NAB strongly suggests that the undertaking of these types of activities inure

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[13] 395 U.S. 367, 390 (1969).

[14] ___ U.S. ___, 36 L. Ed.2d 772, 783, 798-99, 93 S Ct. – (1973).

[15] Red Lion Broadcasting, 395 U.S. at 394.

to the direct benefit of the public and not to commercial broadcasters. By adopting a fee schedule which requires commercial broadcasters to assume the costs of these public services, the Commission has clearly exceeded its authority.

The Commission attempted to justify the new fee schedule by asserting that since the Commission has the authority to adopt fees of some kind, any fees it adopts are permissible and lawful. On its behalf the Commission relied upon the decision in *Aeronautical Radio, Inc. v. United States*[16] as dispositive of questions concerning its authority to assess fees. NAB respectfully submits, however, that the *Aeronautical Radio* case, *supra*, is inapposite to the nature of the fees here imposed by the FCC. In particular, that case upheld the validity of nominal filing fees upon certain types of radio license applications. However, the present case deals with a schedule of substantial fees which cannot be described as nominal and which provides for annual fees unrelated to the receipt of special benefits by the licensee. In other words, *Aeronautical Radio* is inapposite because the present fees are not nominal and the annual fees in particular are not attributable *quid pro quo* to Commission activities designed to confer specific benefits upon the individual payee; at least so held the court in *New England Power Co.*[17]

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[16] 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). *See also* Preliminary Statement, *supra* at note 2.

[17] 467 F.2d at 428, n. 9.

B. The FCC fee schedule is arbitrary and unreasonable.

In adopting the new fee schedules the FCC demonstrated a glaring disregard for the proscriptions of Title V and the Budget Circular. Apparently committed to its goal of recovering its full appropriation, the Commission has merely arbitrarily divided up its total operating budget among the commercial communications services it regulates. Individual service fees were then set at levels to assure that each of the commercial services would pay total yearly fees commensurate with its allocated share of the FCC's budget.

The standards and guidelines for setting fees were specified in Title V and the Budget Circular. Conceivably, as the Commission contends, the agency has the discretion to determine what weight should be placed on each of the factors or criteria involved. But surely a fee can only be valid if the agency has, in fact, considered all of the necessary criteria of the enabling directives. It is clear that the FCC considered the "value to the recipient" factor and it alleged to have weighed the other factors as well:

> Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the "value to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government. 21 F.C.C.2d 502, 503-04 (1970).

There is no evidence, however, that the fees imposed are in return for a "measurable amount of Government service" from which an identifiable recipient obtains a special benefit. Although the Fifth Circuit held that the

Commission need not pro-rate its costs precisely, that court failed to respond to the problem that in fact other interests are being served by the Commission and yet the fee schedule does not reflect those costs separately. Thus, the annual fees assessed against commercial broadcasters were arbitrarily set to recover the costs of regulating noncommercial broadcasting, research activities, speech making, correspondence activities with the public, and so forth.

Similarly, the annual fee bears no relationship to the *quid pro quo* exchange of services and benefits with the Commission. Accordingly, it cannot be said that the annual fee reflects the time and effort expended by the Commission on behalf of the individual "recipient." It is significant that all applications for construction permits, licenses, and assignments or transfers of licenses are accompanied by particular filing fees apart from the annual fee. In essence the annual fee is a charge imposed simply for the privilege of being a licensee; it bears no relationship to any measurable amount of Commission work performed for the particular licensee.

CONCLUSION

Amicus NAB does not question the Commission's authority to assess fees against members of the industry it regulates in an effort to recoup certain of its operating costs. We concede that the Commission engages in certain activities of direct benefit to broadcast licensees and, accordingly, broadcast licensees should pay fair and equitable fees for those services. We do submit, however, that the annual fee, as assessed by the Commission, is totally disparate with the legislative directives governing the adoption of fees by independent agencies.

We respectfully submit that the decision in *New England Power Co.* accurately demonstrates that where the beneficiaries of a particular regulatory program are obscure and the agency service can primarily be considered to benefit broadly the general public, there can be no basis for an agency fee such as the annual broadcast license fee. We urge this Court to rule that in light of the executive directive that independent agencies can only impose fees where there is an identifiable recipient who has received a measurable amount of Government service from which he has obtained a special benefit, the Commission's annual fees are invalid for lack of a measurable amount of service rendered to the particular licensee against whom the charge is imposed.

WHEREFORE, for the reasons stated, NAB respectfully requests this Court to correct and reverse the errors of the Fifth Circuit and the misapprehensions of the law practiced by the Federal Communications Commission and invalidate the annual fees charged commercial broadcast licensees.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-20)[1] is reported at 464 F.2d 1313. The opinions of the Federal Communications Commission (A. 35 to 88 and A. 89 to 139) are reported at 23 F.C.C. 2d 880 and 28 F.C.C. 2d 139.

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari; "A." refers to the separate printed appendix.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1972 (Pet. App. A–23 to A–24), and petitions for rehearing were denied on October 2, 1972 (Pet. App. A–21 to A–22). The petition for a writ of certiorari was filed on January 2, 1973, and was granted on May 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission has authority, under Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, to recoup a portion of its costs of administering the Federal Communications Act, 48 Stat. 1064, 47 U.S.C. 151, *et seq.*, through the imposition of annual fees on CATV systems subject to its jurisdiction after taking into consideration the benefit such companies receive from Commission regulation as well as the other criteria set forth in Title V.

STATUTE INVOLVED

Title V of the Independent Offices Appropriation Act, 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any

person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this title shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

National Cable Television Association, Inc. (NCTA) seeks reversal of a court of appeals decision affirming an order of the Federal Communications

Commission under Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, imposing annual fees on cable television systems.[2] In the court of appeals NCTA contended that "the Commission lacks the authority to impose any sort of an annual fee in cable television, and that in any event this annual fee fails to meet the statutory requirements and amounts to a tax because it fails to consider the statutory element of 'value to the recipient' (*i.e.*, the CATV operators) conferred by the FCC regulation of the industry" (Pet. App. A–14 to A–15; footnote omitted). The court of appeals, however, concluded that the Commission had properly considered all the statutory elements set forth in Title V of the Independent Offices Appropriation Act, 1952, 31 U.S.C. 483a, and that "under the Commission's regulatory scheme which existed from the time of the adoption of these fees until the present, CATV operators have received 'valuable benefits' sufficient to justify the imposition of the annual fee" (Pet. App. A–17). Accordingly, the court held that the annual fee was within the authority delegated to the Commission to make its work of specific benefit "self-sustaining to the full extent possible" under 31 U.S.C. 483a (Pet. App. A–19 to A–20).

A. GENERAL BACKGROUND: FCC REGULATION OF CABLE TELEVISION SYSTEMS

Cable television systems generally provide two types of services to subscribers. First, they carry the tele-

[2] Cable television systems are sometimes referred to as community antenna (CATV) systems.

vision signals of local broadcast stations, and thereby facilitate reception of local signals which might not otherwise be satisfactory. Second, they transmit to subscribers the signals of distant television stations entirely beyond the range of local antennae. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; *United States* v. *Midwest Video Corp.*, 406 U.S. 649.

Under the Commission's 1966 CATV rules, a CATV system could not carry a distant signal into one of the 100 largest television markets without prior Commission authorization after an evidentiary hearing. 47 C.F.R. (1968) 74.1107. Carriage of any local signals as well as carriage of distant signals in smaller markets could commence 30 days after notice, provided no objection had been filed by local stations. 47 C.F.R. (1968) 74.1105(a) and (c). If such an objection was filed, the CATV service could not begin until the Commission ruled on the merits of the objection. 47 C.F.R. (1968) 74.1105(c) and 74.1109.

The Commission subsequently found the hearing requirement of the 1966 rules unduly burdensome since each distant signal carriage question had to be adjudicated on an *ad hoc* basis. Accordingly, in 1968, the Commission suspended all hearings under the 1966 rules, "and action on requests for authorizations to carry signals was deferred pending the completion of the rule making proceeding, unless carriage of the signals requested was consistent with the [newly] proposed rules." 37 Fed. Reg. 3254.

In June 1970, after further study, the Commission announced a different set of proposed rules which

would permit cable systems to carry four distant independent signals. 37 Fed. Reg. 3253. In addition, the Commission proposed to limit the franchise fees which local and state governments could assess CATV operators to 2 percent of a system's revenues. *Ibid.*

Following extensive rulemaking proceedings, the Commission adopted new cable television rules on February 12, 1972. 37 Fed. Reg. 3280. The new rules not only set forth procedures to determine what local and distant signals a cable system may carry, but also require cable operators to seek and receive a "certificate of compliance" from the Commission before commencing "operations or add[ing] a television broadcast signal to existing operations." *Ibid.*[3] While existing cable systems are not required to obtain a certificate immediately, the rules provide that "[n]o cable television system lawfully carrying television broadcast signals in a community prior to March 31, 1972, shall con-

[3] The rules now provide that all cable systems must carry, on request, the signals of all stations in their market, Grade B signals of non-commercial educational TV stations, all translator stations in the cable community with 100 watts or higher power, and all TV stations significantly viewed in the cable community. Cable systems located in the first fifty television markets may also carry on a second priority basis additional stations so as to provide three full network stations and three independent stations. On a third priority basis, the system may carry educational and non-English language stations. In addition a system may carry up to two more independent stations, provided that the number of additional signals permitted under this priority is reduced by the number of signals added under the second priority. Cable systems in the second fifty television markets are subject to similar carriage rules except that they may only carry the signals of two independent stations under the second priority. Cable systems in smaller television markets may carry additional signals so that, including signals required to be car-

tinue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives a certificate of compliance." 47 C.F.R. 76.11(b).

Under the Commission's system of federal standards to be locally implemented, cable operators must receive a franchise from the appropriate local governmental authority before a certificate can be granted. The rules (47 C.F.R. 76.31) require that the franchise contain recitations and provisions consistent with the following:

> (1) The franchising authority has approved the "franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements * * * as part of a full public proceeding affording due process;"
>
> (2) "The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification," and thereafter extension of cable "to a substantial percentage of its franchise area each year * * *;"
>
> (3) "The initial franchise period shall not exceed fifteen (15) years, and any renewal franchise period shall be of reasonable duration;"
>
> (4) "The franchising authority has specified or approved the initial rates" for charges to subscribers, and "[n]o increases * * * shall be

---

ried, the system will carry three full network stations and one independent station. Such systems may also carry additional educational stations and stations programming in non-English languages. Systems located outside any television market may carry any additional signals. 47 C.F.R. 76.57, 76.59, 76.61, and 76.63. Signals carried at the time the 1972 rules became effective were grandfathered. 47 C.F.R. 76.65.

made except as authorized by the franchising authority after an appropriate public proceeding affording due process;"

(5) The franchisee will maintain a local business office or agent to handle complaints from subscribers;

(6) Changes in the Commission's rules will be reflected in the franchise within one year of the change or at franchise renewal, whichever occurs first.

The new rules also limit the franchise fees that may be imposed by the localities in which the CATV stations operate (47 C.F.R. 76.31):

> The franchise fee shall be reasonable (*e.g.*, in the range of 3–5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program.[4]

In fulfilling its regulatory responsibilities the Commission has also taken steps to protect cable operators from unfair competition and to keep entry into the industry open. For example, in 1970, after initially ad-

[4] Existing systems are exempt from this provision for five years or until the end of their franchise period, whichever occurs first.

opting specific rules designed to protect independent CATV operators from discrimination (in favor of their own CATV affiliates) by telephone companies which control the poles on which cables are strung,[5] the Commission promulgated broader rules (47 C.F.R. 63.54–63.57 and 64.601–64.602) which "prohibit telephone companies * * * from furnishing CATV service in their telephone service areas, either directly or through affiliates, and disallow construction by them of cable facilities for independent CATV operators unless the carrier first offers to such operators the option of placing their own cables on the carriers' poles." *General Telephone Co. of Southwest* v. *United States*, 449 F.2d 846, 850 (C.A. 5) (sustaining the rules). Additionally, the Commission restricted television broadcast station and translator station ownership of CATV systems in their service area, and prohibited broadcast net-

[5] In *General Telephone Co. of Southwest* v. *United States*, 449 F.2d 846, 851 (C.A. 5), the court summarized the Commission's initial efforts: "Starting in 1966 the Commission began affirmatively to assert its control over telephone company practices with respect to CATV systems. Several complaints were filed by CATV interests alleging, inter alia, that the carriers favored their subsidiary CATV companies over the independents in a variety of ways and that independents were often required to lease channel service rather than being permitted to rent pole space. Subsequently the Commission determined that the provision of channel service by telephone companies for CATV required certification under Section 214 of the Communications Act. The granting of a certificate was to be predicated on several factors including the degree of affiliation between the telephone carrier and the CATV operator. The Commission was of the opinion that by reason of their control over utility poles or conduits, the telephone companies were in a position to preclude or substantially delay an unaffiliated CATV system from commencing service and thereby eliminate competition."

work ownership of cable systems. See *Second Report and Order, CATV,* Docket No. 18397, 23 F.C.C. 2d 816; 47 C.F.R. 76.501.

B. EARLIER COMMISSION EFFORTS TO IMPLEMENT TITLE V OF THE INDEPENDENT OFFICES APPROPRIATION ACT

In 1963, the Commission for the first time adopted rules prescribing a schedule of fees (28 Fed. Reg. 4758 and 28 Fed. Reg. 10911) pursuant to Title V of the Independent Offices Appropriation Act of 1952, 31 U.S.C. 483a. This statute directs the Commission and other agencies to prescribe fees for any "work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued" by the agency. The statute provides that such fees are "to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts."

The first Commission fee schedule only "established nominal filing fees and produced fee revenues which approximated 25 percent of the Commission's annual appropriation" (A. 3). In *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304 (C.A. 7), certiorari denied, 379 U.S. 966, the court of appeals affirmed both the validity of the Commission's action and the reasonableness of the fees adopted. The court concluded that Title V's authorization did not constitute an unconstitutional delegation of legislative power, and held that the burden of demonstrating the unreason-

ableness of the fee schedule fell upon the petitioners rather than the Commission (335 F.2d at 309):

> To sustain their contention that the schedule does not comply with the statutory guidelines as to the cost to the government, value to the recipient, and public interest served, petitioners must show us that the order assailed is unreasonable or arbitrary: we are not at liberty to interefere with the discretion of the Commission. *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 236-237 * * *.
>
> Petitioners erroneously imply that the Commission had the *burden* of demonstrating that it took into consideration the "direct and indirect cost to the Government," as required by § 140 [now 31 U.S.C. 483a]. The burden is on petitioner to show unfairness. * * *
>
> We think also the Commission's discussion and reasoning in its Report and Order under Safety and Special Radio Services is a complete answer to the contention that the Commission ignored the "value to the recipient" factor and did not attempt to demonstrate benefits to applicants nor relate fees to benefits. It seems quite obvious to us that in view of the number of applicants, petitioners are seeking a most unrealistic performance by the Commission and again erroneously imply that the burden is upon the Commission to justify its fee schedule.

Subsequent changes in the fee schedule generally maintained the 25 percent ratio between revenues and annual Commission appropriations. However, the Bureau of the Budget regularly urged the establishment of higher fee schedules. Similarly, in 1969 the

House Appropriations Subcommittee expressed concern about the Commission's fee schedule, stating that fee charges should be adjusted upward to make the Commission's activities more nearly self-sustaining (H. Rep. No. 91–316, 91st Cong., 1st Sess., pp. 7–8). And the conference committee on the Independent Office Appropriation Bill, 1970 (H. Conf. Rep. No. 91–649, 91st Cong., 1st Sess., p. 6) stated:

> The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency.

Accordingly, the Commission issued a Notice of Proposed Rulemaking on February 18, 1970, seeking to establish a fee schedule more fully comporting with its statutory obligation to make the agency's activities "self-sustaining to the full extent possible" (A. 1–30).[4]

C. REPORT AND ORDER PROMULGATING THE 1970 FEE SCHEDULE

On July 2, 1970, after reviewing extensive comments from interested parties, the Commission issued its Report and Order (A. 35–88) setting forth the new fee schedule. The fee schedule not only revised exist-

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[4] The chairman of a House appropriations subcommittee noted with approval the Commission's proposed increased fee schedule. Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

ing fees for broadcast licensees, common carriers, and licensees in the Safety and Special Radio field, but also imposed fees for the first time upon cable television systems. The Commission noted that since *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, cable television systems "are permitted to operate only in accordance with Commission rules and regulations adopted during the past five years" (A. 41). Moreover, the Commission pointed out that regulation of this type of interstate communication service had come to constitute "a substantial portion of the Commission's responsibilities, and a major staff unit has now been given permanent status to deal with this area" (*ibid.*). It observed that while CATV operators (at that time) did not have to receive a "license" or certificate of compliance prior to commencing operation (*ibid.*):

> the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations. There, therefore, appears to be no reason for distinguishing this service from other communications services which the Commission authorizes and which are now encompassed in the present fee schedule.

Consistent with the statutory mandate of Title V, the Commission first determined its direct and indirect costs for CATV regulation as reflected in its annual budget request. This figure of $1,145,400 represented

4.6 percent of the Commission's total budget request (A. 39–40). In order to produce fee revenues which would approximate the estimated expenditures, the Commission's fee schedule imposed fees for actions on applications (*i.e.*, filing fees) as well as an annual fee for each cable television system.

As an annual fee, the Commission assessed cable television operators 30 cents for each subscriber. In explaining this formula the Commission stated (A. 65):

> (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year thus appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of the fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual reporting by CATV systems; and, finally, (v) that as the Commission obtains such information it will use it for periodic review of the equity of its CATV fee schedule.

The Commission recognized that this approach might "not wholly or precisely reflect 'value to the recipient'", but that "such precision or accuracy is

not required since our proposed fee schedule need only reflect some consideration of 'value to the recipient,' and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard" (A. 44). While the CATV fees (both annual and for applications) would then produce $1,145,000 annually, the growing cable television industry had enjoyed annual revenues of approximately $220,000,000 as early as 1968 (*ibid.*).[7] Although such revenues were obviously "the result of individual private business enterprise and effort and cannot be claimed to derive solely from the Commission's authorizations," they nonetheless served "to place in perspective the very limited extent to which the Commission has considered the [substantial] 'value to the recipient' factor in establishing the fee schedule adopted herein" (*ibid.*).

On petitions for reconsideration, the Commission made certain modifications to its fee schedule but did not alter the basic annual fees imposed on cable television operators (A. 89, 107–110).

D. THE COURT OF APPEALS' DECISION SUSTAINING THE 1970 FEE SCHEDULE

On NCTA's petition for review, the court of appeals affirmed the Commission's order. In sustaining

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[7] NCTA estimated in hearings before the Senate subcommittee considering proposed revisions of the copyright law, that cable television systems had gross revenues of $483.1 million in 1972. Supplemental Comments of National Cable Television Ass., Hearings before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee on S. 1361, 93d Cong., 1st Sess. (July 31, 1973).

the reasonableness of the fee schedule and the Commission's authority to promulgate it, the court of appeals stated that, while the CATV industry may not welcome all of the regulatory measures undertaken by the Commission, "the inquiry under 31 U.S.C. 483 (a) is not whether the regulated industry likes or agrees with all the regulations prescribed, but whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission" (Pet. App. A–17 to A–18). It held that CATV operators "have received 'valuable benefits' sufficient to justify the imposition of the annual fee" (Pet. App. A–17). The court explained that (Pet. App. A–17; footnotes omitted):

> * * * CATV operators have directly benefited from the Commission's various regulations designed to keep entry into the industry open. The Commission has also proposed rules limiting the amount of franchise fees which local governments could charge cable operators. Indeed, as the Commission points out, the entire regulation of cable television is undergoing radical change much of which clearly inures to the benefit of cable operators.

Moreover, the court observed that the Commission's extensive broadcast regulation also benefits cable operators (Pet. App. A–18):

> CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market

structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear that CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

After reviewing the record, the court concluded that the "Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit 'self-sustaining to the full extent possible,' under 31 U.S.C. 483a" (Pet. App. A–19 to A–20). It held that the balance the Commission struck among these factors was not unreasonable or arbitrary, and expressed confidence that the Commission would revise its fee schedule if and when the fees proved unfair, unworkable or to have an adverse effect upon competition in the CATV industry (Pet. App. A–20). It therefore affirmed in all respects the Commission's Report and Order adopting the 1970 fee schedule. Petitions for rehearing were denied (Pet. App. A–21).*

* Since the decision below, the President, in his 1974 budget, proposed substantial increases for FCC cable bureau activities, including 53 new positions at a cost of approximately $710,000. Consistent with its responsibilities for continuing review of the fee schedule, the Commission published a *Notice of Proposed Rulemaking, Schedule of Fees*, 37 Fed. Reg. 28574. The notice observed that administrative costs attributable to cable regulation were expected to reach $3,000,000 or 7.3 percent of the Commission's total budget. To recover these increased costs the Commission proposed to increase the annual CATV fees from 30

SUMMARY OF ARGUMENT

In adopting its 1970 fee schedule the Commission was not only fulfilling its affirmative statutory obligation to render the agency "self-sustaining to the full extent possible," but complying with the sense of Congress that members of profitable regulated industries—rather than taxpayers—should bear the costs of regulation from which they derive substantial special benefits (A. 38). After reviewing extensive comments the Commission concluded that an annual fee based upon a formula of 30 cents per cable television subscriber would serve the statutory objectives of Title V and comply with the policy guidelines set out in Bureau of the Budget Circular No. A–25. These

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cents to 40 cents per subscriber. It estimated that this higher assessment would recover only 88 percent of the regulatory costs for CATV (*Schedule of Fees*, 38 F.C.C. 2d 587, 589–590):

"Adoption of a cable fee schedule yielding that percentage, rather than full coverage, reflects the Commission's desire to offset the unintentional inequities resulting from the cable fee schedule basically adopted in 1970 (and currently in force) under which the Commission's actual cable revenue amounted to approximately 200 percent of cable-regulation budget allocations, and its recognition that cable television, notwithstanding its bright long-run potential for service to the American people, is still in an early developmental stage during which much financial investment is required but profit margins are typically either thin or non-existent."

The Commission's proposed fees would largely recover costs through annual fees rather than actions on applications because "[t]he per-subscriber annual fee more accurately reflects the ultimate benefit to the certificate applicant of the Commission's application processing services." *Schedule of Fees*, *supra*, 38 F.C.C. 2d at 605. The Commission invited and received comments from cable operators, including petitioner NCTA. The matter is presently pending before the Commission.

guidelines specify that fees and charges should be collected to recover "the full cost to the Federal Government" for services which provide benefits to identifiable recipients "above and beyond those which accrue to the public at large."

A. Cable television operators enjoy numerous special benefits, "above and beyond those which accrue to the public at large", and which warrant fee assessments to recover regulatory costs. They benefit most fundamentally from Commission authorizations to carry television broadcast signals. Commission rules predating and post-dating the 1970 fee schedule either have required express Commission permission for signal carriage, or only allowed carriage in a manner consistent with specific guidelines. As the representative of an industry engaged in the distribution of television signals, NCTA can hardly argue that the right to carry signals does not constitute a special benefit under Title V or Bureau of the Budget Circular No. A–25.

Moreover, the benefits enjoyed by cable television operators are not limited to television signal carriage authorizations. The Commission's rules have (1) kept entry into the industry open, (2) eliminated unfair competition from telephone carriers, who had "a natural monopoly over the means required to conduct a CATV operation" and who were "in a position to pre-empt the [CATV] market" (*General Telephone Co. of Southwest* v. *United States,* 449 F. 2d 846, 856 (C.A. 5)), and (3) have limited franchise fees which local authorities may impose. Cable operators also have

benefited from Commission regulations designed to assure a healthy television industry since cable systems are dependent upon the availability of television signals.

While it is true that the Commission's activities are conducted primarily for the benefit of the public, there is nothing in the language of Title V or Bureau of the Budget Circular No. A-25 which precludes the assessment of charges where, as here, substantial special benefits accrue to members of an industry as a result of work performed by a regulatory agency. Since every governmental activity is intended primarily for the benefit of the public, NCTA's argument on this point would, in effect, render the statute virtually meaningless. Neither the language nor the legislative history of Title V justifies such a restrictive interpretation.

B. There is likewise no support in the language of Title V or its legislative history for NCTA's claim that fees can only be assessed under 31 U.S.C. 483a when they are tied to specific services directly rendered to an individual applicant, but that the cost of regulatory activities which confer benefits on the industry as a whole are irrecoverable, even when fairly prorated among its members.

The statutory requirement that in setting fees to recover the cost of its activities the agency should consider "value to the recipient" is broadly phrased, and reflects Congress's express directive that regulated industries should "to the full extent possible" bear the cost of regulation from which they derive substantial benefits. The words of the statute do not limit the agency to recovery of only the costs of work per-

formed for a particular recipient. Rather, as the court of appeals observed, "'value to the recipient' * * * also includes any '. . . service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility. . .'" (Pet. App. A–7, n. 6). 31 U.S.C. 483a. Moreover, the statute expressly provides that services "to or for any person (including *groups,* associations, organizations, partnerships, corporations, or businesses)" (emphasis added) should be self-sustaining. Whether the Commission processes a particular CATV operator's application or provides particular services to it during a fiscal year, each member of the industry receives special benefits resulting from the Commission's regulation of the industry as a whole. It is accordingly reasonable, and in furtherance of the statutory purpose, for members of the industry as a whole to be assessed a pro rata portion of the cost of the regulation which produces these benefits.

C. NCTA's argument that the Commission failed to consider the "value to the recipient" in its fee schedule is equally without merit. As two different circuits of the courts of appeals have observed, the Commission has wide discretion in formulating its fees. Here the Commission quite reasonably concluded that an annual charge based on the number of subscribers was the fairest and most equitable method of balancing the statutory criteria, including the "value to the recipient," *i.e.,* the benefits which the CATV operator annually receives from Commission authorizations and regulations. The record fully supports the Fifth Cir-

cuit's conclusion that the Commission's fee schedule for cable television is "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." 31 U.S.C. 483a.

ARGUMENT

THE COMMISSION ACTED WITHIN THE SCOPE OF ITS AUTHORITY AND RESPONSIBILITIES UNDER 31 U.S.C. 483a IN ESTABLISHING ANNUAL FEES FOR CABLE TELEVISION

A. CABLE TELEVISION OPERATORS RECEIVE SPECIAL BENEFITS FROM COMMISSION REGULATION WHICH WARRANT ASSESSMENT OF ANNUAL FEES TO RECOVER REGULATORY COSTS

The principal source of revenues for CATV systems is the merchandising of broadcast television signals which "they interrupt * * * and put to their own use for profit." *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (Chief Justice Burger, concurring). CATV is thus a special beneficiary of the system of regulation of broadcast signals, and of the system of regulation which assures its right to carry those signals. Since the first comprehensive cable rules were adopted in 1966, the carriage of television broadcast signals by CATV operators has required Commission authorization and been subject to Commission regulation. See, generally, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, and pp. 4–5, *supra*. Although cable systems *per se* were not formally licensed under the 1966 rules, cable operators generally could not begin carriage of distant television signals without prior Commission authorization; had to seek Commission approval to carry local television signals if objections were

filed; and could continue to carry television signals only in a manner consistent with Commission rules. Thus the Commission correctly concluded that cable television systems "directly or indirectly receive what in effect is a Commission authorization tantamount to a 'license'" (A. 41).

This characterization applies with even greater force under the Commission's new cable television rules (*supra*, p. 6). These rules not only establish precise guidelines for signal carriage, but require the grant of a certificate of compliance from the Commission before a cable operator may commence operating or add new signals to an existing system. In addition, franchising by local authorities is now subject to Commission standards (see Statement, *supra*, pp. 7–8).

The question whether Commission signal carriage authorization should be specifically characterized as a benefit," "privilege," "authority," "use," "license," "certificate," "or similar thing of value" is immaterial. For, however characterized, the Commission grants each cable operator a special "benefit" within the meaning of Title V by permitting it to carry and distribute for profit broadcast television signals in competition with regulated television stations which must pay for every hour of programming they transmit.

That this special "benefit" alone is sufficient to warrant the assessment of an annual fee is confirmed by the legislative history of Title V. One of the principal agencies at which Title V was aimed was the Federal Communications Commission. Representative

Sidney Yates, a member of the House Committee on Appropriations who explained the purpose of Title V when it was before the House of Representatives, stated in part (97 Cong. Rec. 4809):

> The Federal Communications Commission grants franchises, licenses, certificates of convenience and necessity, if you will, to all broadcasting stations upon application for such licenses, franchises, and certificates. The Commission undertakes extensive hearings first in connection with a construction permit; secondly on the question as to the allocation of the position of a particular broadcaster in the spectrum of megacycles over which the Federal Communications Commission has control. That is a pretty difficult job and a complicated job, and entails extensive hearings by the Federal Communications Commission. The taxpayers pay every dollar of the charges and of the costs that go into that hearing. The companies pay nothing, other than taxes, and I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, that it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit making. Such companies should assume a greater share of the costs, because regulation is necessary.

While there are some differences in the manner in which CATV operators and television broadcasters

are regulated, there are basic similarities. Contrary to petitioner's allegations (Br. 29), CATV systems do "obtain their right to operate from the Commission." Without Commission authorization (since 1972 through a formal certificate of compliance) they could not carry broadcast signals. All that the CATV systems obtain from local governments is the right to set up their cables;[10] that franchise would be of little use without the Commission's authorization to carry signals on those cables subject to its regulation.

The administrative tasks involved in the issuance of certificates of compliance, and in insuring continued compliance with the Commission's CATV regulations, are substantial. As Chairman Burch recently stated during hearings on the Commission 1973–1974 budget:

> When we announced the rules, we received a large number of applications for certificates of compliance, which is the jargon for license, if that be the expression, in the cable television field. We have a considerable backlog, and when I first came to the Commission, we had a very small group called the Cable Television Task Force, which was really just that. Since that time, we have come out with rather sophisticated rules, and the budget request is for 53

[10] This was clearly stated in the colloquy between Senator Pastore and Chairman Burch, from which petitioner (Br. 28–29) has reprinted other excerpts:

"Senator PASTORE. May I ask a question? In other words, if a person applies for a franchise to a city or a state, that is only for the privilege of setting up his cables?

"Mr. BURCH. Yes, sir."

Hearing before the Subcommittee on Communications of the Senate Committee on Commerce on Community Antenna Television Problems, 92d Cong., 1st Sess., p. 87.

> positions and 40 man-years, the bulk of which will be used to process applications and to enforce our various rules and regulations in cable television. [Hearings before the Senate Committee on Appropriations on HUD, Space, Science and Veterans and Certain Other Independent Agency Appropriations, Part 2, 93d Cong., 1st Sess., p. 1329.]

While the Commission does not protect a CATV operator's right to operate "in the particular point of the spectrum," it has provided comparable regulatory protection to CATV systems. Until the Commission acted—at the behest of the CATV industry—the ability of CATV systems to operate was in serious jeopardy as a result of the control that telephone companies exercised over the means of transmitting cable signals. As the National Cable Television Association—the petitioner here—explained to the court of appeals in its brief in *General Telephone Co. of the Southwest* v. *United States, supra* (Br. 9):

> Telephone company control over CATV market entry is premised on the fact that virtually every community throughout the country, for esthetic and other reasons, allows but a single set of utility poles. The right to erect such poles is a privilege granted by the state or local authority in the public interest. Telephone companies usually control the communications space on the poles where CATV attachments are located, either through ownership of the poles or by mutual arrangement with other utility companies. Through this control over telephone poles and rights-of-way, it has a natural monopoly that carries with it enormous power to

> grant or deny access to independent entrants into the CATV business.
>
> The telephone company's power as the sole lessor of space on its poles pursuant to pole attachment agreements is clear. When this power is held in concert with the telephone company's own interest in owning CATV systems directly or through an affiliate, or as lessor of channel distribution facilities to its affiliated systems, the likelihood that the telephone company will abuse its monopoly position is greatly increased.

NCTA directed the attention of the court of appeals to the comment of the Department of Justice which pointed to "the serious danger that the existing local monopoly position of the telephone companies as communications common carriers may prevent the development of an independent CATV industry" (Br. 9, n. 11). More significantly, petitioner represented to the court of appeals that the Commission's regulation banning telephone carriers from operating CATV systems (and the decision of the court of appeals on the challenge to the validity of the regulation) "have and will have a direct impact on NCTA and its members as well as the public whom the CATV industry serves. NCTA is vitally concerned with this impact on its existence and the existence of the CATV industry as a developing and significant part in the communications of this country" (Motion to Intervene, p. 2).[11]

The Commission's activities have not stopped merely at insuring "the existence" of the CATV systems

[11] Copies of the motion to intervene and the brief filed by NCTA have been lodged with the Clerk of the Court.

which petitioner represents. The Commission has kept entry into the industry open by restricting television broadcasters' entry into the CATV business. Moreover, since CATV systems must obtain franchises from the local communities who have ultimate control over the "cables" which pass over or under public streets, the Commission has acted to protect CATV systems from exorbitant revenue-raising franchise fees. As the Commission stated (37 Fed. Reg. 3276–3277; footnote omitted):

> While we have decided against adopting a 2 percent limitation on franchise fees, we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have exacted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about 5 or 6 percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments.

The Commission explained that it was, therefore, limiting local franchise fees to a level necessary to support *only* the cost of regulatory activities (37 Fed. Reg. 3277):

> We are seeking to strike a balance that permits the achievement of Federal goals and at

the same time allows adequate revenues to defray the costs of local regulation.

* * * * *

The Commission imposes an annual fee of 30 cents per subscriber to help finance its own cable regulatory program. Assuming average annual revenues to the cable system of $60 per subscriber, the Commission's fee amounts to one-half of 1 percent of a system's gross receipts. The regulatory program to be carried out by local entities is different in scope and may vary from jurisdiction to jurisdiction. It is our judgment that maximum franchise fees should be between 3 and 5 percent of gross subscriber revenues.

Finally, the Commission stands ready to undertake further steps to protect and foster the growth of the CATV systems consistent with the public interest. As the court of appeals observed, "regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators" (Pet. App. A–17).

B. THE ASSESSMENT BY THE COMMISSION OF ANNUAL FEES ON CABLE TELEVISION OPERATORS IS CONSISTENT WITH BUREAU OF THE BUDGET CIRCULAR NO. A–25

Having largely ignored both the history and language of Title V, petitioner's argument appears to rest largely on the alleged failure of the Commission to adhere to the policy directives contained in Bureau of the Budget Circular No. A–25 (A. 143). The Circular was adopted pursuant to the provision in Title V that "the head of each Federal agency is authorized by regulation (which, *in the case of agencies in the execu-*

tive branch, shall be as uniform as practicable and subject to such *policies* as the President may prescribe) to prescribe therefor such fee, charge, or price, * * * as he shall determine * * * to be fair and equitable * * *" (emphasis supplied). The Bureau of the Budget Circular, as it expressly states, was intended to "set forth some general policies for developing an equitable and uniform system of charges * * *" (A. 142).

While the Federal Communications Commission is an independent regulatory agency, and not subject to policy directives for "agencies in the executive branch," we submit that the Commission's annual assessment is, in any event, entirely in accord with the guidelines set forth in Bureau of the Budget Circular No. A–25. The Circular provides in pertinent part:

> a. *Special Services:*
>
> (1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:
>
> (a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent * * *); or
>
> (b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certifi-

> cates of necessity and convenience for airline routes * * *); or
>
> (c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate * * *) [A. 143].

The benefits we have described at pp. 22–29, *supra*, come within each of the categories set forth in the policy statement. Clearly the privilege of "exploit[ing] the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution" [11] enables the members of the CATV industry to obtain "more immediate or substantial gains or value * * * than those which accrue to the general public." This privilege not only derives from the issuance of a certificate of compliance—or the pre-1972 procedure which involved less formal authorization to carry broadcast signals, but through the various regulatory activities described above which enable CATV systems to operate without hindrance from the telephone carriers, without substantial competition from the CATV affiliates of television networks, and protected from exorbitant local franchise fees. The Commission's activities thus not only enable the CATV systems to obtain more "immediate or substantial gains or values * * * than those which accrue to the general public" (Circular Subd. a) but also ensure "business stability" (Circular Subd. b).

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[11] *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (Chief Justice Burger, concurring).

Similarly, while some of the initial efforts undertaken by the Commission proved unsatisfactory both to the CATV systems and the Commission, it cannot seriously be suggested that the rules and regulations adopted by the Commission relating to the financial responsibility of CATV systems, their method of operation and the manner in which rates are to be regulated, do not contribute to assuring "public confidence in the business activity of the beneficiary" (Circular Subd. b).

Finally, although the Commission's assumption of jurisdiction over CATV systems, pursuant to the Federal Communications Act, was not at the "request" of the CATV industry (Circular Subd. c), the industry has not been reluctant to seek the Commission's assistance where necessary. Indeed, it was at the request of NCTA, the petitioner here, that the regulation barring telephone carriers from engaging in the CATV business, which was so vital to the existence of independent CATV systems, was adopted.

In sum, since compliance with any one of the three lettered subdivisions under the heading "Special Services" suffices to satisfy the standards of the Bureau of the Budget Circular, it is clear that those standards have been met here.

C. CONGRESS EMPOWERED REGULATORY AGENCIES TO MAKE THEIR PROGRAMS SELF-SUSTAINING BY IMPOSING ANNUAL AS WELL AS FILING FEES

1. Although NCTA acknowledges the Commission's authority to establish filing fees—a proposition which had been affirmed earlier in *Aeronautical Radio, Inc.*,

supra—it attempts to deny the Commission's authority to impose "annual" fees, claiming that the statute recognizes an inherent distinction between "filing" and "annual" fees. It contends (Br. 33):

> Where an application or pleading is involved, the fee is directly related to a voluntary act. Here the additional annual CATV charges, beyond the filing and application fees, arise out of no voluntary action initiated by the charged company.

In effect, according to NCTA, fees cannot be assessed under 31 U.S.C. 483a unless they are tied to specific services directly rendered to an individual applicant. The cost of regulatory activities which confer benefits on the industry as a whole, however, are irrecoverable, even when fairly pro-rated among its members.

Nothing in the statute or its legislative history supports such a restrictive interpretation. The statutory requirement that in setting fees to recover the cost of its activities the agency should consider "value to the recipient" is broadly phrased, and reflects Congress' express directive that regulated industries should "to the full extent possible" bear the cost of regulation from which they derive substantial benefits. The words of the statute do not limit the agency to recovery of only the costs of work performed for a particular recipient. Rather, as the court of appeals observed, "'value to the recipient' * * * also includes any '* * * service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility * * *'" (Pet. App. A–7, n. 6). 31 U.S.C. 483a.

Moreover, the statute expressly provides that services "to or for any person (including *groups*, associations, organizations, partnerships, corporations, or businesses)" (emphasis added) should be self-sustaining. Whether the Commission processes a particular CATV operator's application or provides particular services to it during a fiscal year, each member of the industry receives special benefits resulting from the Commission's regulation of the industry as a whole. It is accordingly reasonable, and in furtherance of the statutory purpose, for members of the industry as a whole to be assessed a pro rata portion of the cost of the regulation which produces these benefits.

2. NCTA argues (Br. 42–46) that the annual CATV fee is in fact an unlawful tax on gross revenues. The issue here, however, is not the label to be attached to the annual assessment, but whether Congress in fact authorized its imposition. Since petitioner does not suggest that Congress could not have expressly authorized the imposition of the annual fee at issue, the issue is merely statutory and, as we have just shown, Title V, properly interpreted, does authorize annual assessments.

The apparent purpose of the claim that the asessment is a "tax" and not a "fee" is to direct the attention of the Court to prior statements of the Commission and its Chairman which are allegedly inconsistent with its present position. There is, however, no conflict.

When imposing an initial fee on the filing of applications, the Commission observed (25 Pike and Fischer Radio Reg. 1559, 1563):

> While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, *we believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.* [Emphasis added.]

The imposition of the annual assessments at issue here similarly is not intended for "the support of the government as a whole," but for the support of an agency whose operation and function result in substantial benefits to those who have voluntarily entered a business affected with a public interest and subject to the special benefits and obligations that devolve from Commission regulation.

Moreover, there is nothing in the statement of Chairman Burch cited by petitioner (Br. 44) which "belies its [the Commission's] conduct in imposing the CATV annual fee schedule" (Br. 43). At the hearings on the Commission's 1973–1974 budget, Senator Proxmire, having read of the lucrative nature of the CATV business as detailed in an article in the Wall Street Journal, proposed a tax which would generate far more

revenue than necessary to recoup the cost of regulating the CATV industry. He stated:[13]

> The article indicates that cable TV is a highly lucrative area. Not as lucrative, I am sure, as the AM–TV broadcasting, but mighty lucrative. They gave an indication of some of the gold prospectors who are in this, and they are the people who have been very successful in the past.
>
> What I am getting at is that what you gentlemen do when you allocate frequencies is to provide an enormous property right, just a terrific property right. It is a tough problem that you have in providing that property right. What would be the consequences—I do not know if you have thought of them or maybe some of the other Commissioners have some views on this—what would be the consequences of charging a substantial fee to the broadcasters for the right to operate, to use for general public purposes—I am not talking about enough to bring the budget up to $36.8 billion. I am talking about bringing in *revenues of hundreds of millions of dollars a year by charging for the enormous privilege that is being given not only on radio and television but now opening up on cable television.* [Emphasis added.]

It was in response to this suggestion that Chairman Burch stated:[14]

> What is involved here, clearly, is a form of taxation—and the F.C.C. has no taxing powers nor should it, in our view, have such powers.

[13] Hearings before the Senate Committee on Appropriations on HUD, Space, Science and Veterans and Certain Other Independent Agency Appropriations, *supra*, at 1332.

[14] *Id.* at 1339.

This is a matter for Congressional action alone. Should the Congress wish to explore this question further, we would of course be prepared to supply whatever additional data might be required.

D. THE COMMISSION'S ANNUAL FEES ARE "FAIR AND EQUITABLE TAKING INTO CONSIDERATION DIRECT AND INDIRECT COST TO THE GOVERNMENT, VALUE TO THE RECIPIENT, PUBLIC POLICY OR INTEREST SERVED, AND OTHER PERTINENT FACTS"

Title V requires that the fees to be paid by beneficiaries of Commission regulation "be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." The statute thus confers on the Commission a broad measure of discretion in setting fees. As the court below aptly observed (Pet. App. A-7):

> In the first instance, the weighing of these statutory factors or "whether * * * all * * * must play a quantitative share" in the judgment made, was for the Commission. *Aeronautical Radio, Inc.* v. *United States,* 335 F.2d 304, 309 (7th Cir. 1964) *citing Secretary of Agriculture* v. *Central Refining Roig Co.,* 338 U.S. 604, 611, 612 * * *.

Indeed, the burden is upon the party challenging the Commission's fee schedule to show "that the order assailed is unreasonable or arbitrary." *Aeronautical Radio, Inc.* v. *United States, supra,* 335 F.2d at 309.

NCTA apparently concedes that the Commission properly considered the "direct and indirect cost to the Government," "public policy or interest served," and all "other pertinent facts." However, NCTA

contends that in prescribing the formula for annual fees to be paid by cable television operators the Commission either failed to consider the "value to the recipient" from Commission regulation, or weighed that factor in an arbitrary way. The court of appeals properly rejected this contention, for the record shows that the Commission considered the "value to the recipient" and balanced that factor with the other statutory factors in a reasonable manner.

One of the purposes of assessing an annual fee in the first place was to reflect more accurately the "value to the recipient" from Commission authorizations. The Commission explained that (A. 4):

> * * * in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, the new fee schedule adopts the concept of a separate fee reflecting our consideration of the "value to the recipient" factor involved in authorizations and licenses.

NCTA argues that the number of subscribers a system enjoys may not be the best way to reflect this value. But on judicial review the question is not what is the best choice, but was the agency's choice reasonable. See, *e.g.*, *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742, 749; *Radio Corp.* v. *United States*, 341 U.S. 412, 420. The Commission's decision reflected a reasonable choice which recognized the complexities of the problem (A. 44):

> We fully recognize that the factors we have used [such as advertising rates in the broadcast field and subscribership in the CATV field] may not wholly or precisely reflect "value to the re-

> cipient". But such precision or accuracy is not required since our proposed fee schedule need only reflect some consideration of "value to the recipient," and our fees, in total, fall far short of the total value of Commission licenses, grants and authorizations computed by any standard.

We have shown in the Statement (pp. 12–15, *supra*) that the Commission looked at total agency costs for CATV regulation; predicted costs recoverable through filing fees; and considered CATV subscription rates, and typical CATV revenues. It then concluded that an annual fee of 30 cents per subscriber would not only give recognition to the immense value of Commission authorization enjoyed by CATV systems on an annual basis (through their annual charges to subscribers), but would best serve the statutory objectives of Title V. All of these factors show "that there is sufficient relationship between the Commission's conclusions and the factual bases in the record upon which it relied to substantively support this exercise of its authority" under the statute. *United States* v. *Allegheny-Ludlum Steel, supra,* 406 U.S. at 755–756. Nothing in NCTA's contentions indicates that the Commission acted in an arbitrary or capricious manner in adopting this method of assessment. In the words of the court below (Pet. App. A–19 to A–20):

> The Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit "self-sustaining to the full extent possible," under 31

U.S.C. 483a. Considering all factors revealed by the record the balance which the Commission struck was not unreasonable or arbitrary in our opinion."[11]

E. THE FACT THAT THE COMMISSION'S PRINCIPAL GOAL IS TO SERVE THE PUBLIC INTEREST DOES NOT PRECLUDE THE IMPOSITION OF AN ASSESSMENT ON A BUSINESS WHICH DERIVES SUBSTANTIAL BENEFITS FROM COMMISSION REGULATION

Although, as we have shown, the CATV industry has substantially benefited from Commission regulation in a manner different from that of the public generally, petitioner asserts that reference to these benefits "misses the point entirely" because "[t]he regulatory history of CATV regulation has simply not been designed to 'benefit' the CATV industry as a whole * * *" (Br. 24). This contention is without substance.

The regulatory activities of the Federal Communications Commission are "designed" to serve the public interest, as set out by Congress, by "mak[ing] avail-

[11] While NCTA repeatedly cites the decision in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, 479 F.2d 183 (C.A.D.C.), for the proposition that "value to the recipient" was not properly considered, the opinion in that case dealt solely with the question whether documents in the Commission's possession fell within the scope of the Freedom of Information Act, 5 U.S.C. 552. Nothing before the court in that proceeding dealt with the Commission's authority to assess CATV fees. Nor did the decision collaterally attack the earlier Fifth Circuit opinion upholding on the record before that court the Commission's rulemaking proceedings in all respects. See 479 F.2d at 185–186, n. 2.

able * * * to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service * * *." 47 U.S.C. 151. Applying this broad policy directive to the regulation of CATV systems, the Commission has observed that its "basic objective is to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television" (37 Fed. Reg. 3259). This reflects the Commission's finding that the "public interest is served by preserving a healthy broadcast service" (37 Fed. Reg. 3259, n. 32), and its determination to be "guided by the standard of what will best serve the public interest and not by a desire to protect any industry from the impact of new technology" (*ibid.*).

Petitioner's basic argument appears to be that because the Commission has not permitted CATV systems free reign without regard to the public interest, those systems have not benefited from the work of the Commission. This argument, we submit, "misses the point." Congress was obviously aware that the Commission's basic function in regulating the transmission and carriage of broadcast signals is to serve the public interest. But it also recognized, as we have shown, that along with the burdens which regulation entails, those persons who are granted the privilege of carrying or transmitting broadcast signals derive substantial benefits and that—in the words of Representative Yates—it is unfair that the "taxpayers pay

every dollar of the charges and costs" involved in regulating a recipient's use of this highly profitable privilege.

While the Court of Appeals for the District of Columbia Circuit has held that "[t]here is something fundamentally wrong in assessing charges on the basis of benefit to the company when the [Federal Power] Commission must benefit the public" (*New England Power Company* v. *Federal Power Commission*, 467 F. 2d 425, 429, pending on writ of certiorari, No. 72-1162), that policy assessment—upon which the court refused to sustain the validity of the fees at issue in that case—has no proper place in the construction of Title V. For, as was stated in the brief filed by the Solicitor General on behalf of the Federal Power Commission in *Federal Power Commission* v. *New England Power Company*, No. 72-1162, pp. 21-25, every regulatory agency and every program enacted into law by Congress is intended principally to serve the public interest. If the fact that the public is the principally intended beneficiary of a particular program is sufficient to defeat an assessment under Title V, then the statute could virtually never be successfully invoked (except, perhaps, by showing that a program was not achieving its intended effect of benefiting the public interest[16]) and the congressional goal, ex-

[16] But, as Judge Tuttle observed for the court in the *General Telephone Co.* case, *supra*, 449 F. 2d at 859, "[t]he wisdom or expediency of a given law or regulation is not open to question in the courts."

pressed in the Act, that work performed by federal agencies be "self-sustaining to the full extent possible," would be defeated."

The proper standard, as suggested by Bureau of the Budget Circular A–25, is whether there are "identifiable recipient[s]" of "special benefits * * * above and beyond those which accrue to the public at large * * *" (A. 143). This is the standard which the court of appeals correctly applied in the present case in ruling that "the inquiry under 31 U.S.C. 483a is * * * whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission" (Pet. App. A–17 to A–18).

Under that standard, the Commission's annual assessments properly implement Title V and are consistent with the language and history of the statute and with the Bureau of the Budget Circular.

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[11] The degree to which the general public might benefit from a particular government service is not cited in Title V as a factor bearing on whether a charge can be assessed against persons who receive special benefit from the service. The language of the Act indicates, instead, that special beneficiaries should be charged for all such services toward the end of making them self-sustaining. The only reference in the statute to the degree of public benefit comes later when "public policy or interest served" is listed as a factor to be considered in determining the fairness of the fee to be charged for particular services.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Writ of Certorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

SUMMARY OF ARGUMENT

The issue here concerns the Federal Communications Commission's authority under Title V of the Independent Offices Appropriations Act of 1952, as interpreted by the Bureau of the Budget Circular No. A-25 of 1959, to exact its particular CATV annual charges imposed

in 1970, and not its authority to exact charges generally. That above authority permits a fee to be charged where there is an identifiable recipient of an agency's service from which he receives a special benefit or other thing of value.

To support its claims that the annual charges are proper, the Commission alleges that its regulatory scheme is of special benefit to the CATV industry as a whole. If each CATV system availed itself of the requisite benefits each year it paid the annual fee the Commission's theory could not be faulted. But the bulk of existing CATV system paying the annual fee in 1970 have never made any request or filing with the Commission in the course of the year. Thus, many identifiable CATV systems have never received from the Commission a "measurable unit" of service from which they obtain a "special benefit." Consequently, the Commission has not overcome its obvious inability to identify the special benefit provided in 1970 to each CATV system required to pay the annual fee.

The Commission does argue that it provides a general "authorization" of CATV operations as a result of its regulation. A CATV system does not require Commission authority to operate. This authority is granted at the local or state level. The so-called "authorization" of which the Commission speaks is the regulatory method by which it restricts CATV systems' competition with television broadcast stations by preventing certain signal carriage. Neither do the Commission's claims, subsequent to its *Report and Order,* of special benefit from its telephone cross-ownership regulations support its annual fee.

The Commission's repeated references in its brief to its 1972 CATV regulation is improper. These regula-

tions did not exist at the time the 1970 annual fee was established. Nor were they considered by the Fifth Circuit in the decision now before this Court for review.

The Commission alleges that it has complied with the terms of the Bureau of the Budget Circular No. A-25, In fact, the Commission, in its argument, ignored the Budget Bureau's specific illustrative examples of special benefit. A review of these examples makes it clear that the special benefit to be provided involves the receipt of a formal authorization or are individual services performed at the request of a member of the public. The legislative history of the Appropriations Act confirms this view. Instead the Commission relies on the general phrasing of the Circular and argues that its regulation has provided "business stability" to the industry and "enabled (CATV systems) to obtain more immediate gains or values." Impartial observers, including the Commission itself, have concluded that the principal thrust of the Commission CATV regulatory scheme has been to stifle the development of CATV to protect the television broadcasters.

The Commission claims to have considered in a proper manner the factor of "value to the recipient" in establishing its CATV annual fee. After over three years and subsequent to the filing of petitioner's brief in this Court, the Commission has reversed itself and admitted that it did not have any other documents or information related to "value" of its CATV regulation in establishing its CATV fee schedule. In an overwhelming desire to recover its total CATV regulatory costs the Commission has established an annual

fee based solely on its determination (although improper) of its direct and indirect cost of CATV regulation.

ARGUMENT

I. The Critical Issue Is Not Whether the Entire CATV Industry Is an Identifiable Recipient But Whether There Exists a Special Benefit to Each CATV System Justifying the Annual Fee.

NCTA, in its brief, argued, that the Commission's regulation of the CATV industry provides no benefit or other thing of value, and certainly not to an identifiable recipient. Furthermore, NCTA observed that the value or benefit must be provided to a specific identifiable recipient. It cannot be to the public generally or the CATV industry as an amorphous entity. Most CATV systems do not avail themselves of Commission service in any given year and thus, are not an identifiable recipient. (Pet. Br. 32). Consequently, there simply is no related benefit or service in the Commission's 1970 CATV regulation which would justify the imposition of an annual fee on all CATV systems recouping the total cost of all Commission CATV regulation.

The Government maintains that the Petitioner's argument has misread the intent of the Appropriations Act and its legislative history. It attempts to avoid identifying any special benefit, and argues that the question is, in fact, whether the CATV industry as a whole rather than individual CATV systems, may properly be considered an identifiable recipient.

The Government's brief arranges the issue in this fashion:

> In effect, according to NCTA, fees cannot be assessed under 31 U.S.C. 483(a) unless they are tied

> to specific services directly rendered to an individual applicant. The cost of regulatory activities which confers benefits on the industry as a whole, however, are unrecoverable, even when fairly prorated among its members. (Res. Br. 33)

The brief continues:

> Whether the Commission processes a particular CATV operator's application or provides particular services to it during a fiscal year, each member of the industry receives special benefits resulting from the Commission's regulation of the industry as a whole. It is accordingly reasonable, as in furtherance of the statutory purpose, for members of the industry as a whole to be assessed a pro rata portion of the cost of the regulation which produces these benefits. (Res. Br. 34)

If in every year each CATV system obtained the necessary special benefits beyond those accruing to the public at large, the correctness of the government's argument could not be faulted.[1] But the Commission simply cannot overcome its lack of identification of the special benefit by arguing that a *group* as well as an individual recipient which avails itself of special benefits during the year could have the costs of its regulation recovered by annual fee.[2]

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[1] The Government's argument also presumes that the cost of the agency's general regulatory activities conferring the benefits on each CATV system are "fairly pro-rated among its members." (Res. Br. 20, 23)

[2] The Commission states that NCTA opposed an annual fee based on CATV subscribers. (Res. Br. 38) If the requisite special benefit to an identifiable recipient were present, the allocation of the cost of providing the benefit on a per subscriber basis would become a pertinent issue. NCTA's argument is, in fact, that when CATV systems do not avail themselves of the special benefit, an annual fee based on fees from each subscriber is an unconstitutional tax on gross revenue.

The Court in *New England Power Co.* v. *Federal Power Commission*[3] was faced with this same agency argument and rejected it:

> Indeed under the Commission's order, petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. In effect then the contemplated charges would have no relation to specific services or benefits rendered. The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. *This assumption is erroneous in that in any given year some companies may require substantial services from the Commission while others may neither require nor desire them.* (Emphasis added) (Cert. D-8)

Indeed, the Government brief, relying on the same argument that the CATV industry as a whole may be an identifiable recipient, avoids identifying what special benefits accrue to each and every CATV system each year justifying the industry-wide annual fee approach. With this failure, as *New England Power* demonstrates, the abstract argument which the Commission raises is irrelevant.

The facts clearly demonstrate that the Commission's CATV regulations in 1966 resulting in the protracted freeze on growth and even continuing today do not each year confer on every CATV system special benefits above and beyond those accruing to the public at large.

In a related effort the Government declares that NCTA attempts to deny the Commission any authority

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[3] 467 F.2d 425 (D.C. Cir. 1972).

under the statute to impose "annual fees" as distinguished from filing fees: (Res. Br. 33)

> (NCTA) attempts to deny the Commission's authority to impose "annual" fees, claiming that the statute recognizes an inherent distinction between "filing" and "annual" fees.

While the Government chooses to argue the propriety of an annual fee *per se* to recover regulatory costs, this again is not the issue to be decided here. The issue restated is whether the Commission at the time it exacted its 1970 annual fee on each CATV system conferred the requisite special benefit on CATV systems required by the Title V of the Independent Offices Appropriations Act (65 Stat. 290; 31 U.S.C. 483(a) (1952)) and the Bureau of the Budget Circular No. A-25 and, if so, whether the annual fee charged to particular CATV systems is related to any such statutory "benefits".

II. The Government Has Failed To Demonstrate That the Commission's CATV Regulation in 1970 Resulted in the Special Benefit to an Identifiable Recipient Within the Meaning of the Appropriations Act.

NCTA maintained in its brief that the Commission's regulation existing at the time of the imposition of the 1970 annual fee does not provide the requisite special benefit to uphold the annual fee. The Commission's "ancillary" jurisdiction of CATV had frozen the growth of the industry. (Pet. Br. 20-24) NCTA further stated that the Commission regulation of CATV is not an "authorization" of a CATV system's operation but rather is a tool used to restrict its service and thereby its competition to the television broad-

caster. (Pet. Br. 27-30) Indeed, the franchise to operate is granted at the local level for which annual franchise fees are paid.

Nowhere in the Commission's 1970 *Notice of Proposed Rulemaking* or *Report and Order* in Docket 18802 did the Commission provide any indication or identification of the special benefit to CATV to justify the imposition of the annual fee. The extent of the Commission's rationale as set forth in both documents was simply stated in the Commission's *Notice of Proposed Rulemaking in Docket 18802:*

> The first area concerns Community Antenna Television systems which, as interstate communication services, are permitted to operate only in accordance with Commission rules and regulations adopted during the past 5 years. The Commission's authority to regulate the conduct of CATV activities under various permissive and restrictive regulations was affirmed by the U.S. Supreme Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). Its regulation of this type of interstate communication service now constitutes a substantial portion of the Commission's responsibilities and a major staff unit has now been given permanent status to deal with this area. *While the Commission's regulatory approach does not require a prior approval by the Commission in the form of a license before one may provide this communication service to subscribers, the rules and regulations which have been adopted affect every CATV system and, in effect, each of the more than 2,240 operating CATV systems has been given general authorization to provide this interstate communication service in accordance with applicable rules and regulations.* There, therefore, appears to be no reason for distinguishing this service from other communication services

> which the Commission authorizes and which are now encompassed in the present fee schedule. (Emphasis added) (A-5)

This was repeated verbatim in the *Report and Order*. (A. 41)

It is common sense that, insofar as communications regulation is concerned, the "special benefit" or the thing which is of "value to the recipient" is a license or similar authorization with all the attendant benefits and privileges issued by the Commission.[4] The Government in its *Report and Order* and elsewhere does concede that at the time the annual fee was imposed the Commission did not license cable systems. (Pet. Br. 28) Nor does it do so today. (Pet. Br. 27-30) But in an effort to squeeze CATV into a special beneficiary status, the Commission claims that CATV received authorizations to carry broadcast signals tantamount to a license which are of some value to CATV. The Government states:

> Cable television operators enjoy numerous special benefits, "above, and beyond those which accrue to the public at large," and which warrant fee assessments to receive regulatory costs. They benefit most fundamentally from Commission authorizations to carry television broadcast signals. *Commission rules predating and postdating the 1970 fee schedule either have required express Commission permission for signal carriage, or only allowed carriage in a manner consistent with specific guide-*

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[4] In the midst of debate found in 107 Cong. Rec. 14587-88 (August 3, 1961), Congressman Jones of Missouri spoke of *"licensing of the facilities on which the Federal Communications Commission issues a license,"* and of levying fees on those "who are benefitting from *these licenses,"* and of the Commission's "authority to levy a *license fee."* (Emphasis added)

> *lines.* As the representatives of the industry, engaged in the distribution of television signals, NCTA can hardly argue that the right to carry signals does not constitute a special benefit under Title V or Bureau of the Budget Circular No. A-25. (Emphasis added) (Res. Br. 19)

At the time of the imposition of the annual fee the great majority of CATV systems had never requested authority from the Commission in order to provide their signal reception service. The Commission rules did not require it. CATV systems, in certain situations, were required to give minimum notice to television broadcasters before beginning service.[5] The so-called "authorization" of which the respondent speaks is the regulatory method by which the Commission restricted CATV systems' competition with broadcast stations by preventing certain signal carriage.

The Commission, in an effort to balloon its alleged "authorization" of CATV operation in 1970, attempts to minimize the scope of the local franchise of CATV systems. It declares:

> Contrary to petitioner's allegation, CATV systems do obtain their right to operate from the Commission. Without Commission authorization (since 1972 through a formal certificate of compliance) they could not carry broadcast signals. All that the CATV systems obtain from local governments is the right to set up their cables; that franchise would be of little use without the Commission's authorization to carry signals on those cables subject to its regulation. (Res. Br. 29)

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[5] The Commission's *Report and Order* in Docket 18802 provided a series of filing and application fees when relief from the Commission's signal carriage restrictions were sought.

The Commission itself recognized the dominant role of the local government in authorizing CATV operation. In declining to undertake the licensing of CATV systems in its 1972 *Cable Television Report and Order,* the Commission rationalized:

> *The comments advance persuasive arguments against federal licensing. We agree that conventional licensing would place an unmanageable burden on the Commission.* Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts. (Emphasis added) 36 F.C.C. 2d 207 (1972)

A franchise, in addition to regulating a CATV company's use of the public streets under the police powers, will prescribe various terms and conditions under which the operation of a CATV system could be maintained, *i.e.,* provisions controlling CATV subscriber rates, internal records and books, location of offices and operational and technical standards. The franchise may also provide for the provision of free channels for educational and governmental use, and for free service to school systems and other public institutions. It is, in fact, the document that coordinates the establishment of CATV services in the community on the public rights of way similar to the Commission's grant of broadcast licenses in the public electromagnetic spectrum.

Apart from the "authorization" argument, it was only during judicial review that the Commission came forward with any rationalization of special benefits to support its annual fee.

As the basis for its annual CATV fee, the Commission takes a quantum leap from its regulation of CATV to its "authorization" of CATV operation to "permitting (CATV) to carry and distribute for profit broadcast television signals."

The Government brief argues that:

> The question whether Commission signal carriage authorization should be specifically characterized as a "benefit," "privilege," "authority," "use,' "license," "certificate,"' "or similar thing of value" is immaterial. For, however characterized, the Commission grants each cable operator a special "benefit" within the meaning of Title V by permitting it to carry and distribute for profit broadcast television signals in competition with regulated television stations which must pay for every hour of programming they transmit. (Res. Br. 23)
>
> * * *
>
> Clearly, the privilege of "exploit(ing) the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution (Footnote omitted) enables the members of the industry to obtain more immediate or substantial gains or value . . . than those which accrue to the general public." (Res. Br. 31)

The Commission's posture appears more as a collector of copyright fees or an equalizer of "unfair competition". While Congress may require copyright fees as a result of the use of copyrighted material encompassed in broadcast signals, the Commission cannot exact annual fees from CATV under the Appropriations Act on the grounds that CATV provides a reception service for broadcast signals for profit.

The function of CATV systems' carriage of broadcast signals was described succinctly by this Court in

Fortnightly Corp. v. *United Artists Television, Inc.*[6] when it stated:

> Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewers television set. (Footnote omitted)

Petitioner's brief thoroughly examined the Commission's disasterous CATV regulatory scheme existing at the time of the imposition of the annual fee in 1970. (Pet. Br. 18-31) One really must stretch the imagination to conclude that the existence of a freeze of CATV growth in television markets containing over four-fifths of the nation's population is a specific, identifiable privilege or benefit to CATV.

As to its CATV regulatory program existing in 1970, the Commission, before the Court of Appeals, could provide after the fact allegations of only a single specific action of the Commission as the requisite special benefit or thing of value—the telephone and broadcast cross-ownership regulations. The Fifth Circuit in *Clay Broadcasting Corp.* v. *Federal Communications Commission,*[7] similarly forced to go outside the Commission's *Notice* and *Report and Order,* also focused on these rule makings as the necessary benefit to the identifiable recipient to justify the exacting of annual fees. (Cert. A-17) But as the Petitioner's brief points out, ownership restrictions simply determine who may not own CATV systems in given circumstances and do nothing to enhance the value of the

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[6] 392 U.S. 390, 400 (1968).

[7] 464 F.2d 1313 (5th Cir. 1972).

system itself. (Pet. Br. 30-31.) Thus cross-ownership prohibitions are designed, not for the benefit of the industry, but for the benefit of the public either by foreclosing monopolies in broad-band communications or preventing the media from limiting channels of communications in given communities.

An analogous competitive climate argument, as the requisite statutory benefit, was rejected in *New England Power Co.* v. *Federal Power Commission, supra,* where the Court held that an economic climate was not the requisite special benefit and the particular utility not the "special beneficiary" or "identifiable recipient" of such climate any more than any other company or consumer in general. (Cert. D-8.)

The Commission itself, in adopting its *Final Report and Order* in Docket 18509,[8] instituting the telephone cross-ownership rules, demonstrates that the primary intention in enacting the open entry regulation was the benefit of the public interest, not CATV systems as identifiable beneficiaries. The Commission declared its view that:

> We believe that the public interest in modern and efficient means of communications will best be served, at this time, by preserving, to the extent practicable, a competitive environment for the development and use of broadband cable facilities and services and thereby avoid undue and unnecessary concentration of control over communications media either by existing carriers or other entities. We are of the opinion that the preservation of such competition will best be assured by the exclusion of telephone companies in their service areas from engaging in the sale of CATV serv-

[8] 21 F.C.C. 2d 307 (1970).

> ice to the viewing public except where no practical alternative exists to make such service available within a particular community. *Supra,* at 325.

The Court in *New England Power, supra,* concluded that "the regulation of these (utility) industries is primarily for the benefit of the public" and that "in the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury." (Cert. D-9) The Commission's cross-ownership regulations can be characterized in the identical manner.

Both Congressional and Budget Bureau direction demands that there must be a "special benefit to an identifiable recipient *above and beyond* those accruing to the public at large." The special benefit does not have to be to the exclusion of public benefit. An examination of the Commission's filing and grant fees demonstrate that the Commission action involved confers benefit on the general public and yet these fees are not at issue here.

The paucity of *any* regulation existing in 1970 with even remote special benefit to the individual CATV system or to the industry in general is obvious. As a result, the Government's brief is replete with references of beneficial CATV regulation in its recent *Cable Television Report and Order* in the Federal Register effective March 31, 1972, two years after the Commission imposed the CATV annual fee at issue here.[9]

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[9] These new CATV rules had been adopted, not as a result of extensive rulemakings as the Commission suggests, but as a result of a consensus agreement entered into by the National Cable Television Association, the National Association of Broadcasters and the Committee of Copyright Owners in November, 1971. The Consensus

(footnote continued)

But NCTA submits to this Court that *ex post facto* efforts prior to final judicial review cannot remedy the defect of the agency's prior action. These Commission 1972 regulations did not exist at the time the 1970 fee was established. The Commission did not consider them in its *Notice of Proposed Rulemaking* nor its *Report and Order*. These 1972 CATV regulations were not before the Fifth Circuit in *Clay Broadcasting* nor did the Fifth Circuit consider them in its decisions presently before this Court for review.

The Government relies on its 1972 requirement of a certificate of compliance for CATV systems. (Pet. Br. 6-7) Even these regulations do not provide the special benefit. Existing CATV systems are not required to obtain the so-called certificate of compliance until March 31, 1977.[10] Similarly, most existing systems are not covered by the Commission's 1972 franchise guidelines until 1977. Yet it is these existing systems which have been required to pay millions of dollars in CATV annual fees since 1970.

Agreement was agreed to by the CATV industry after concluding that broadcaster and other political pressure on the Commission dictated that it was not going to act to relax the freeze on CATV. The recent study of the Brookings Institute of the 1972 Commission's *Cable Television Report and Order* describes this arm bending on the part of the White House and the Commission to continue protection of broadcast interests, and the resulting Commission action. *Infra*, p. 20.

[10] As to its requirement for a certificate of compliance the Commission established the following effective date:

> A system in operation on March 31, 1972 does not have to file an application for certification if no new signals are added to the system, but will have to apply for certification when its current franchise expires or by March 31, 1977, whichever comes first. *Cable Television Report and Order*, 36 F.C.C. 2d at 186.

The Government makes much of its 1972 regulation which protects CATV systems "from exorbitant revenue raising franchise fees." The impetus for the Commission's original proposal was the decision of the United States Court of Appeals for the Sixth Circuit in *Wonderland Ventures, Inc.* v. *City of Sandusky*,[11] the law was already established that CATV franchise fees could not be unreasonable.

In summary, however, reliance on any of its new CATV regulations forces the government to argue that an annual fee imposed on CATV systems in 1970 is supported by alleged benefits not imposed until almost two years later and not available to the CATV systems paying the annual assessment in many cases until 7 years later. These arguments must be ignored.

III. Comprehensive Review of the Bureau of the Budget's Guidance and the Legislative History of the Appropriations Act Contradicts the Commission's Rationale for Its CATV Annual Fees.

The Commission, contrary to petitioner's argument in its brief, maintains that it has followed the policy directives of the Bureau of the Budget and that its annual CATV fee "is entirely in accord with the guidelines set forth in Bureau of the Budget Circular No. A-25." (Res. Br. 30)

The Budget Circular provides illustrative examples where a special benefit will be considered to accrue to holding that franchise fees may not exceed the local government's cost of regulating the franchise.[12] Thus,

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[11] 423 F.2d 548 (Sixth Cir. 1970).

[12] *See, Notice of Proposed Rulemaking*, in Docket 18892, 25 F.C.C. 2d 50 (1970).

an identifiable recipient justifying an agency charge. The Commission never refers to the Budget Bureau examples, nor gives any reason for such failure. These illustrative examples were obviously meant to limit the Bureau's general phrasing consistent with the terms of the Appropriations Act and the Circular requiring an identifiable recipient.

To the contrary, the Commission relies instead on the general phrasing of subsection (a), (b) and (c) of the Circular. Even this does not support the Commission's position. For example, subsection (c) of the Budget Circular states that a special benefit will be considered to accrue when a Government service is performed *at the request of the recipient and is above and beyond the services received by other members of the same industry or group or of the general public.* Even under its reliance on an overly broad interpretation, the Commission admitted the inapplicability of subsection (c) since the CATV industry had opposed Commission jurisdiction. However, the Commission's manipulation of subsection (c) points to the fallacy of the overall logic of its annual CATV fee.

The Commission states that NCTA requested the Commission to bar telephone carriers from engaging in the CATV business in markets where they provide telephone service. (Res. Br. 32) Subsection (c) indicates the need for both a request and a service *above and beyond the services received by other members of the same industry.* Many existing CATV systems paying the annual fees had no interest or concern with telephone ownership of CATV. More dramatically, those telephone company-owned CATV systems continuing to operate since 1970 on an interim basis must

pay the annual fee despite assuredly finding no service in this regulation.

The Commission also argues that under subsections (a) and (b), the agency's general CATV regulatory scheme in 1970 enabled CATV systems "to obtain more immediate or substantial gains," provided "business stability" and "ensured public confidence in the business activity of [CATV]."

In *New England Power, supra,* the Court rejected the argument of the FPC and found that the creation of "economic climate" is not a special service nor is a particular company a "special beneficiary" of such climate any more than any other company or the consumer in general. The Court concluded that the regulation of the gasoline and power companies was primarily for the benefit of the public.

NCTA maintains that while the issue is not whether the Commission's general CATV regulation produced "business stability" and "public confidence" in the cable television industry, the Commission's 1970 regulating scheme has resulted in a lack of confidence in the industry among investment bankers and others about CATV's potential for growth.[12]

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[12] On June 30, 1971, exactly one year after the imposition of the CATV annual fee, Mr. Guy C. Roberts of the Massachusetts Mutual Life Insurance Co. and Mr. Roger J. Schulz, Assistant Vice President of Morgan Guaranty Trust, New York, at a Financial Seminar sponsored by NCTA, stated that capital availability to the CATV industry had been greatly diminished because of the confusion and uncertainty of the Commission's CATV regulations. *See, Toward the Wired Nation*—The Financial Implications of Developing Cable Communications (transcript of the proceedings) p. 40.

A recent study by the Brookings Institution entitled "The Economic Aspects of Television Regulation" [14] provides an impartial and expert view of three noted economists as to the true effect of the 1972 Commission regulation on the business stability of the CATV industry. After describing the Commission's efforts to limit the immense benefits of cable television in order to protect over-the-air broadcasting the study concludes:

> The FCC August (1971) letter of plans for CATV regulation reflect this minimal view of signal importation. *The November 1971 accord* [*Consensus Agreement*] *between the broadcasting and cable industries, ratified virtually intact by the FCC the following February* [*The Cable Television Report and Order*] *implied an even more restrictive view. This accord is said to be the result of FCC and White House pressure, and reflects the sort of compromises and sacrifices of consumer welfare described in Chapter 4.* (Emphasis added) *supra*, p. 179.

The impact of the continued restrictions on the carriage of broadcast signals and other potential CATV services will be stifling to the development of CATV for years to come.

Brookings declared:

> The accord [The 1972 Cable Television Report and Order] places in jeopardy the wiring of the nation—particularly in the top fifty markets that comprise two-thirds of the television homes. Our calculations cannot estimate the probable penetration of such a restricted system, since present broadcasting has no counterpart to such a hybrid.

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[14] R. Noll, M. Peck, J. McGowan, *Economic Aspects of Television Regulation*, 1973.

> *Most likely, these restrictions will stunt cable development for another decade.* (Emphasis added) *Supra*, p. 181.

Outside this litigation the Commission has been quite candid about its CATV regulatory approach. On October 12, 1973, Dean Burch, Chairman of the Federal Communications Commission, stated in a speech to CATV operators in Rockford, Illinois:

> There is, indeed, everything to be said for giving the consumer a choice—which leads me to a few concluding observations about the regulatory process in general. I sometimes think the only people who enjoy regulation more than the regulators are the object of all our attention, the regulatees. Present company is, of course, excluded. *In any event, the FCC has spent more time and effort during the last decade holding cable television back than regulating it.* (Emphasis added.) Address by the Honorable Dean Burch, Chairman, at the Rockford Cablevision Dedication. p. 5.

Thus, it is clear that even with the improper deletion of the specific examples, the general Bureau of the Budget guidelines still do not support the Commission's annual fee schedule. A more detailed examination of the Circular further erodes any Commission support from the Bureau of the Budget.

The Commission, in quoting from the Circular, omitted the Budget Bureau policy statement. The General Policy section of the Circular states:

> 3. General Policy: A reasonable charge, as described below, should be made to each identifiable recipient for a measurable unit or amount of government service or property from which he derives a special benefit. (A. 143)

Thus reasonable charges can be levied on each identifiable recipient only when there is a measurable unit of government service from which he derives a special benefit.

Furthermore, the Circular's series of illustrative examples of specific benefits in section 3 (a) and (b) were intended to give clear meaning to the broad phrases such as "immediate or substantial gains or values," "business stability" and "public confidence." To rely on the broad interpretation advocated by the Commission would result in the courts being forced to determine for each industry whether an agency's regulatory programs "provided business stability" or "ensured public confidence in the business activity of the beneficiary." Neither Congress nor the Bureau of the Budget intended to impose such a burden.

Each and every one of the specific benefits illustrated in the Circular involves the receipt of a formal authorization such as certificates of operations of business, licenses, patents, or are individual services performed at the request of a member of the public. The Commission has provided nothing of this nature to CATV systems justifying the CATV annual fee.

NCTA is accused of ignoring the legislative history in arguing that the Appropriations Act was not a broad revenue raising measure designed to insure that every facet of an agency's regulatory scheme is self-sustaining.

NCTA, in its brief, alluded to the legislative consideration of the Senate Committee on Expenditures in the Executive Department in the second session of the 81st Congress. In report No. 2120, entitled "Fee for Special Services" the Senate Committee reached its conclusions on "the practicality and propriety of

establishing fees for services which the Federal Government renders to special interests."

The interest of the Congress in agencies being reimbursed for costs of regulation was limited by the Committee as follows:

> The committee's approach, therefore, is not from a revenue-raising perspective, but is rather with the view of determining the feasibility of offsetting items now necessarily included in the Federal budget as nonreimbursable by transferring the financial burden thereof to the special beneficiaries. Thus, at the outset, it is desired to draw a clear line of distinction between services which the Federal Government renders, either upon request or by law, to special interests to which benefits thereby accrue at the expense of all the taxpayers, and services for which the Government is inherently liable and the benefits of which accrue to the people at large. *Id.* at p. 1.

The Committee continued this approach:

> There has been no quarrel with the philosophy governing the study that those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof. In the several staff reports and press releases which have been issued, occasion has been taken to reiterate that philosophy and to give reassurance that there is no thought here to establish a system of fees for fundamental Government services, but only to explore the feasibility and fairness of shifting to special beneficiaries the expense now being borne for them by the taxpayers at large. *Id.* at p. 3.

The Senate Committee Report provided examples of services which would justify equitable fees. The processing of applications or grant of a broadcast license

by the Federal Communications Commission was considered an appropriate benefit. The Report stated:

> The Federal Communications Commission renders a tremendous variety of services, a substantial number of which would lend themselves to equitable fees. The Commission processes applications and grants permits for the construction and operation of commercial radio stations. Such an operating permit is in effect a franchise to a segment of the radio audience. The Federal Government sees to it that the right to that audience is not disturbed, and the operator is thus able to insure to purchasers of time over the facilities access to the market addressed. Construction permits constitute the Commission's heaviest workload, involving in an increasing number the necessity of formal hearings so as to provide a sound basis for granting or denying an application. This is a costly process and one which the Government renders without charge. True, the applicant himself may be put to some personal expense in the filing of his application and through attendance at a subsequent hearing, but he does not defray any of the cost to which the general public is put to conduct a proceeding which may assure to the applicant a remunerative business under special Federal protection. This is an outstanding example of a service for which a fee may most appropriately be assessed.

The Government cited the statement of Representative Yates during the debates of Title V of the Appropriations Act as explanatory of the statute's purpose. (Res. Br. 24). Had the Government continued further into Representative Yates' testimony, it is difficult to believe they would have submitted his testimony to support the Commission's CATV assessment—an annual fee unrelated to any specific benefit and recovery of the total cost of Commission regulation.

Representative Yates continued:

I think also that the Government should be able to recaputure *some of the costs* that go into the hearings of the other regulatory agencies. Such fees are appropriate for many of the hearings which take place before the Interstate Commerce Commission. I know that in my home city of Chicago the city requires the owner of every building which operates a passenger elevator to obtain a license for that elevator, and in order to recoup the costs for inspection in such licensing it required a rather nominal licensing fee.

The Interstate Commerce Commission in required to inspect locomotives of railroads, safety appliances, signaling systems, various facilities of that type. The Government pays every cent for this operation. In addition to that, much of the work of the Interstate Commerce Commission is involved with hearings on *applications for certificates of convenience and necessity* for bus lines and other common carriers. The Government assumes the complete cost of such hearings in spite of the fact that here again it grants a franchise which is very valuable to the company making the application and in the operation of which franchise it is protected from competition.

Each of the Commissioners who appeared before us was asked his opinion as to whether or not it was feasible to charge *for a portion of the operations* of the agency and in each event the Commission thought that it would be practicable. Not only that, one Commissioner expressed the viewpoint that such a practice would not only be feasible but would deter and do away with many superfluous applications. Therefore, the subcommittee in its deliberations decided to put a new legislative section into the bill which would permit each of the agencies to appraise its own

> operations to see whether or not it would be possible to recapture for the Government *some of the costs* that the Government incurs in connection with this regulation through the establishment of a schedule of fee. 97 Cong. Rec. 4809(1951)

The intent of Congress in enacting Title V of the Appropriations Act was to permit charges for specific licensing types of service. Those charges would relate to the grant of the service and would not be used to recoup the total cost of all aspects of an industry's regulatory program.

IV. Recent Commission Admissions in Conjunction With the Other Evidence, Demonstrate That It Failed To Consider Value to the Recipient in Establishing Its CATV Annual Fee.

As evidenced above the Commission has not fulfilled the requirements of the Appropriations Act and the Circular that in order for a fee to be exacted there must be an "identifiable recipient" of a "measurable unit" of service from which he obtains "value" or "special benefit." The Appropriations Act also requires that the charges must be fair and equitable, taking into consideration value to the identifiable recipient as well as the direct and indirect cost,[15] public interest and other factors.

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[15] The government's brief suggests that NCTA "concedes that the Commission properly considered the 'direct and indirect' cost" in setting its annual fees. (Res. Br. 37.) The Commission is well aware of NCTA's substantial concern with the Commission's computation of its direct and indirect cost of regulations in establishing the 1970 annual fee. In its comments in 1970, to the proposed CATV fee schedule, NCTA complained of miscalculations in the Commission's computation of CATV regulatory costs. This argument was pursued in the Fifth Circuit, but the Court chose not to respond to that issue. This error was mentioned in Petitioner's Brief before this Court but subdued to the broader value and

(footnote continued)

NCTA, in its brief, charged that the Commission totally ignored or substantially misconstrued the statutory factor of "value to the recipient" in establishing its CATV annual fee. (Pet. Br. 34-41). The Commission had no other choice but to avoid this statutory requirement since, as NCTA has shown, no appropriate "value" or benefit resulted from the Commission's regulation of cable television systems. There simply was "no work, service . . . benefit . . . franchise, license, permit . . . or similar thing of *value* performed, furnished, p r o v i d e d" which would authorize the imposition of the annual fee on each and every CATV system.

If the Commission considered "value to the recipient", it improperly construed that value as CATV system profitability. The Commission's own admission, as pointed out in Petitioner's Brief, confirms this error. (Pet. Br. 36-38).

A very recent admission of the Commission provides further overwhelming evidence that no proper value or benefit to the recipient CATV systems did exist. Following the release of the Commission's *Notice of Proposed Rulemaking* in 1970, NCTA sought to obtain information from the FCC, under the Freedom of Information Act, relating to its consideration of value or benefit of its CATV regulation. In response, the

benefit issue. (Pet. Br. f.n. 38). However, additional information made available on August 1, 1973, in settlement of its freedom of information litigation, in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, 479 F. 2d 183 (1972) has confirmed the substantial error in CATV cost computation. The CATV industry, for example, was charged $188,726 of the Commission's Field Engineering Budget rather than the $12,308 which the Budget Bureau had allocated to CATV for the fiscal year 1971.

Commission's Executive Director asserted that the Commission had such documents.[16] However, the Executive Director denied NCTA access to this information because it was alleged to be of a confidential nature and therefore exempt under the Freedom of Information Act. In a hearing on the Commission's Motion to Dismiss before the United States District Court for the District of Columbia, the Executive Director was questioned by NCTA counsel as to the existence of particular documents related to "value to the recipient" of the CATV regulation. He confirmed that the documents did exist in the files of the Commission, but would not be available to NCTA.

However, subsequent to the filing of Petitioner's Brief before this Court, the Commission totally reversed itself. The Court of Appeals decision in *National Cable Television Association, Inc.* v. *Federal Communications Commission, supra,* reversing the District Court's dismissal, required the Commission to either provide the documents and information on value for NCTA or to establish a statutory exemption. (Pet. Br. 38-40). In settlement of this appellate order, the Commission's General Counsel, in a letter to NCTA, dated August 1, 1973, admitted that it possessed no doucments or other information related to value to the recipient CATV systems other than the information contained in the *Notice* and *Report and Order* in Docket 18802.[17]

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[16] Letter of Max Paglin, Executive Director of the Federal Communications Commission of March 25, 1970. (Pet. App. 1A.)

[17] The letter stated in pertinent part:

> The Commission and NCTA further agree and stipulate that my staff has searched the record in an effort to discover any documents or other information used to determine "value to the recipient" of cable regulation for fiscal year 1971. After a

NCTA's brief has referred to the finding of the District of Columbia Circuit's decision that the Commission had failed to "supply any specifics" or "definition and qualification" of value to the recipient in its *Notice of Proposed Rulemaking* in Docket 18802.[18] (Pet. Br. 39)

Faced with the Court of Appeals order, the Commission was forced into damaging contradictions, buffered only by the obligatory reliance on its *Notice* and *Report and Order*. After over three years of litigation, the Commission, by its own admissions, has demonstrated that it has ignored the standards of the Appropriations Act and acted arbitrarily and unreasonably in establishing the 1970 annual CATV fee. The Commission has no factual basis for assessing the value to CATV systems from its regulation beyond conjecture of some CATV systems' profitability. Are there no limits on fees of a government agency?

Regulation of an industry cannot permit an agency to state inherently that it therefore provides an authorization of that industry's operation to its benefit or that a single regulation benefits the ownership possibilities of all industry members. If an agency can with such claims recover every dollar spent for each industry regulatory program, agencies will con-

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thorough search, we represent that with respect to the *Notice of Proposed Rulemaking*, 35 Fed. Reg. 3815 (February 18, 1970), we do not possess any documents or other information used to determine value to the recipient CATV systems, other than the information contained in the referenced *Notice* and subsequently adopted *Report and Order* in Docket 18802.

[18] This finding was required under the Freedom of Information Act to determine whether NCTA's request for this information was "identifiable" in relation to any reference by the Commission to "value" in its *Notice*.

tinue to seek higher Congressional appropriations on the grounds that no individual taxpayer's money will be involved. Higher appropriations mean higher regulatory costs and the need for higher annual fees. [19]

Three years have passed since first effort to recover its total regulatory cost the Commission's and its budget has risen 75% to 42 million dollars. The Commission is already engulfed in this vicious circle.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Fifth Circuit should be reversed as to the annual charges levied against CATV systems by the Federal Communications Commission.

Respectfully submitted,

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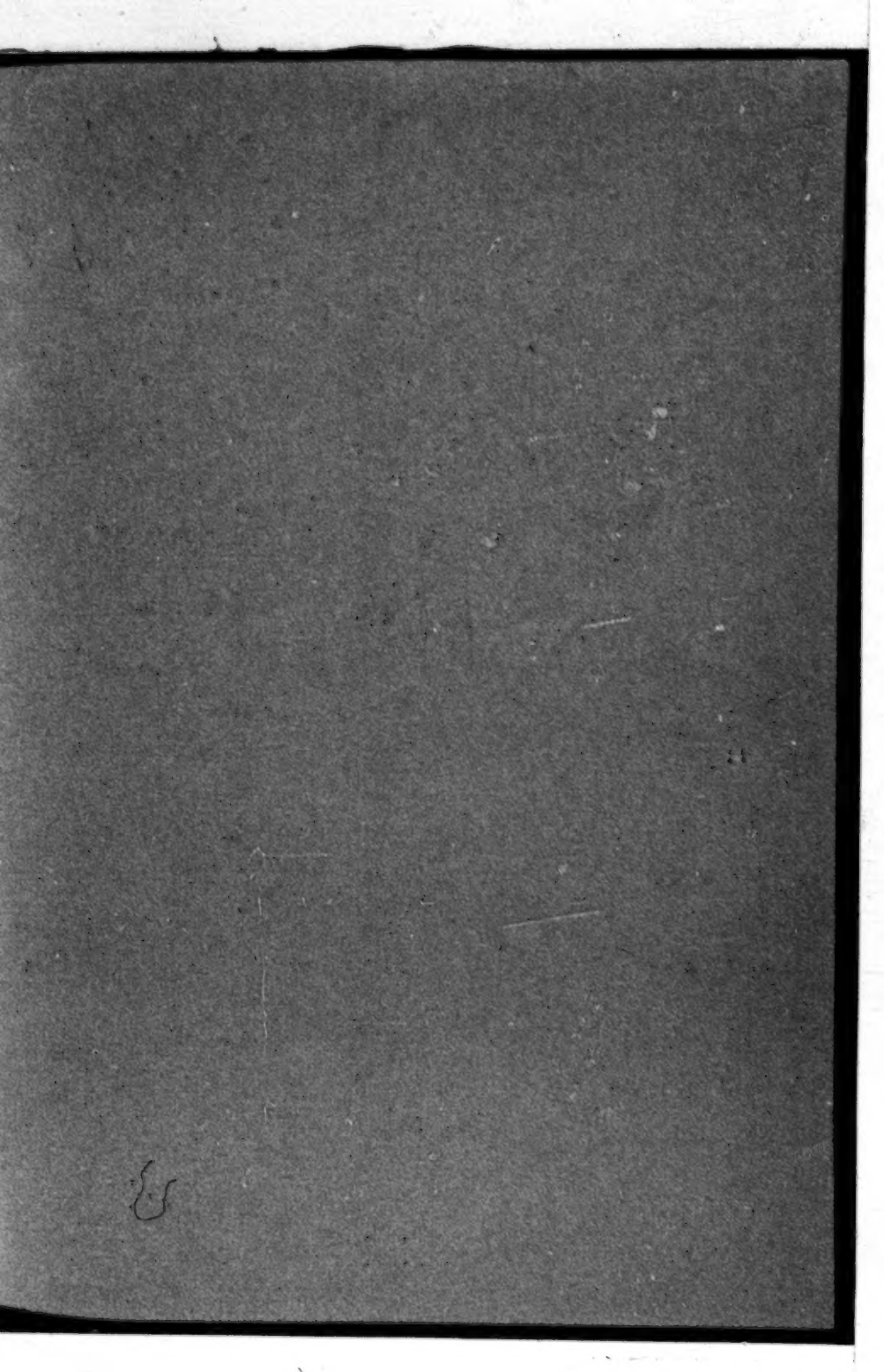
[19] As Petitioner pointed out in its brief (Pet. Br. 9 f.n. 11), the Commission, in a *Notice of Proposed Rulemaking* in Docket 19658 of December 27, 1972, 38 F.C.C. 2d 587, less than three years after its initial annual assessment, has proposed to increase the CATV annual assessment 33⅓ percent to 40 cents per subscriber purportedly to cover the increasing costs of implementing a variety of new CATV regulations.



NATIONAL CABLE TELEVISION ASSN., INC. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-948. Argued December 3, 1973—Decided March 4, 1974

The Independent Offices Appropriation Act, 1952 (hereafter the Act), authorizes each federal agency to prescribe by regulation such fee for the agency's services as is determined to be fair and equitable, taking into consideration the direct and indirect "cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." Pursuant to the Act, the Federal Communications Commission (FCC), in revising fees imposed upon Community Antenna Television (CATV) systems, first estimated its direct and indirect costs for CATV regulations, and then, while retaining filing fees, added an annual fee for each CATV system at the rate of 30¢ per subscriber, concluding that this fee would approximate the "value to the recipient" used in the Act. The Court of Appeals, on a review obtained by petitioner, a CATV trade association, approved the FCC's action. *Held:*

1. The Act authorizes the imposition of a "fee," which connotes a "benefit" of "value to the recipient." The latter phrase is the proper measure of the authorized charge, not the "public policy or interest served" phraseology which, *if read literally*, would enable the agency to make assessments or tax levies whereby CATV's and other broadcasters would be paying not only for the benefits they received but, contrary to the Act's objectives, would also be paying for the protective services the FCC renders to the public. Pp. 340–343.

2. The FCC should reappraise the annual fee imposed upon the CATV's. It is not enough to figure the total cost (direct and indirect) to the FCC for operating a CATV supervision unit and then to contrive a formula reimbursing the FCC for that amount, since some of such costs certainly inured to the public's benefit and should not have been included in the fee imposed upon the CATV's. Pp. 343–344.

464 F. 2d 1313, reversed and remanded.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 352. BLACKMUN and POWELL, JJ., took no part in the decision of the case.

Stuart F. Feldstein argued the cause for petitioner. With him on the briefs was *Stephen A. Gold.*

Edward R. Korman argued the cause for the United States et al. With him on the brief were *Solicitor General Bork, Assistant Attorney General Kauper, John W. Pettit,* and *Joseph A. Marino.**

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Independent Offices Appropriation Act, 1952, Tit. 5, 65 Stat. 290, 31 U. S. C. § 483a, provides in relevant part: "It is the sense of the Congress that any work, service . . . benefit, . . . license, . . . or similar thing of value or utility performed, furnished, provided, granted . . . by any Federal agency . . . to or for any person (including . . . corporations . . .) . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . ." [1] Petitioner is a trade association rep-

*Briefs of *amici curiae* urging reversal were filed by *Harold J. Cohen, F. Mark Garlinghouse,* and *Lloyd D. Young* for the American Telephone & Telegraph Co., and by *John B. Summers* for the National Association of Broadcasters.

[1] The Committee Report, H. R. Rep. No. 384, 82d Cong, 1st Sess., 2–3, makes the following comment on this measure:

"The Committee is concerned that the Government is not receiving full return from many of the services which it renders to special

resenting Community Antenna Television (CATV) systems which transmit TV programs by cable. The Federal Communications Commission is authorized to regulate these CATV outlets, as the Court held in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157. The power to regulate, though not in the form of granting licenses,

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beneficiaries. Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.

"It is understood that other committees of the Congress have interested themselves in this matter and that studies now are under way which may result in further legislation to require that adequate consideration be received for such services. However, such studies are necessarily time-consuming and the required legislation may not be enacted for a considerable period. Accordingly, the Committee has inserted language in the bill (Title V, page 60) which would authorize and encourage the charging or increasing of fees to the extent permitted under present basic laws, but which would in no way conflict with studies now under way to effect changes in such basic laws.

"It is estimated that in 1952 the Government will receive more than $300,000,000 in fees from sources of the type here under consideration. It seems entirely possible that many of these fees could be raised, and that fees could be charged for other services of similar types in cases where no charge is now made, to the extent that the Government might realize upwards of $50,000,000 additional revenue.

"The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. It is not the Committee's intention in including this provision to disturb existing practices with respect to charges for postal services, sales of power, or the interest on loans by the Government."

extends to the promulgation of regulations requiring the compulsory origination of programs by CATV. *United States* v. *Midwest Video Corp.*, 406 U. S. 649. These CATV's, however, are not under the exclusive oversight of the Commission. Local governments and even some States provide permits or franchises to CATV's, including rights of way for the cables used. Some communities in return for their permits require the CATV to pay an annual percentage fee as a gross receipts tax.[2]

The Commission in 1964 established only nominal filing fees that produced revenues which approximated 25% of the Commission's annual appropriation. See 21 F. C. C. 2d 502, 503. See also *Aeronautical Radio, Inc.* v. *United States*, 335 F. 2d 304. The Bureau of the Budget urged higher fee schedules; and so did the committees of the Congress. See H. R. Rep. No. 91–316, pp. 7–8, and H. R. Conf. Rep. No. 91–649, p. 6, where it was stated:

> "The committee of conference is agreed that the fee structure for the Commission should be adjusted to fully support all its activities so the taxpayers will not be required to bear any part of the load in view of the profits regulated by this agency."

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[2] The most recent CATV rules adopted by the Commission (37 Fed. Reg. 3280) require a CATV to receive a certificate of compliance from the Commission, 47 CFR § 76.11 (b), and require it to obtain from the appropriate local government authority a certificate containing prescribed recitations and provisions. 47 CFR § 76.31. The new rules also limit the franchise fees that may be imposed on CATV's by the localities where they operate. 47 CFR § 76.31. Included in the new rules are restrictions on telephone companies on whose poles the CATV cable is usually strung. See 47 CFR §§ 63.54–63.57, 64.601–64.602. And see *General Telephone Co.* v. *United States*, 449 F. 2d 846, 851; Report of Jan. 14, 1974, Cabinet Committee on Cable Communications (known as the Whitehead Report).

The Commission, after notice and hearing, revised existing fees for licensees and for the first time imposed fees upon CATV's. It first estimated its direct and indirect costs for CATV regulation which were $1,145,400 or 4.6% of its total budget request for that year. Filing fees were retained; and there was added an annual fee for each cable television system at the rate of 30 cents for each subscriber. The Commission, finding that subscription rates clustered at about $5 a month, concluded that the 30-cent fee would typically amount to only about one-half of 1% of a CATV system's gross revenues from subscription. The fees would produce, it said, $1,145,000 annually, and it concluded that the 30-cent fee would approximate the "value to the recipient" used in the Act, 23 F. C. C. 2d 880; 28 F. C. C. 2d 139.

Petitioner obtained review of the decision in the Court of Appeals, which approved the Commission's action, 464 F. 2d 1313. The case is here on a petition for certiorari which we granted, 411 U. S. 981, because of an apparent conflict between the decision in this case and the decision in *New England Power Co.* v. *FPC*, 151 U. S. App. D. C. 371, 467 F. 2d 425, of the Court of Appeals for the District of Columbia Circuit.

Taxation is a legislative function and Congress, which is the sole organ for levying taxes,[3] may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e. g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for

[3] By Art. I, § 8, cl. 1, of the Constitution it is the Congress that has the "Power to lay and collect Taxes."

a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U. S. C. § 483a narrowly as authorizing not a "tax" but a "fee." A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation. The addition of "public policy or interest served, and other pertinent facts," *if read literally,* carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

The lawmaker may, in light of the "public policy or interest served," make the assessment heavy if the lawmaker wants to discourage the activity;[4] or it may make the levy slight if a bounty is to be bestowed; or the lawmaker may make a substantial levy to keep entrepreneurs from exploiting a semipublic cause for their own personal aggrandizement. Such assessments are in the nature of "taxes" which under our constitutional regime are traditionally levied by Congress.

There is no doubt that the main function of the Commission is to safeguard the public interest in the broadcasting activities of members of the industry. If assessments are made by the Commission against members of the industry which are sufficient to recoup costs to the Commission for its oversight, the CATV's and other broadcasters would be paying not only for benefits they received but for the protective services rendered the public by the Commission. The fixing of such as-

[4] Mr. Chief Justice Marshall is credited with the statement that "the power to tax is the power to destroy," to which Mr. Justice Holmes replied, "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 223 (dissenting opinion).

sessments, it is argued, is the levying of taxes. The Court, speaking through Mr. Chief Justice Hughes said in *Schechter Corp.* v. *United States*, 295 U. S. 495, 529:

> "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, § 1. And the Congress is authorized 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

Congress, of course, does delegate powers to agencies, setting standards to guide their determination. Thus, in *Hampton & Co.* v. *United States*, 276 U. S. 394, Congress enacted a flexible tariff law which authorized the imposition of customs duties on articles imported which equaled the difference between the cost of producing them in a foreign country and of selling them here and the cost of producing and selling like or similar articles in the United States. Provision was made for the investigation and determination of these differences by the Tariff Commission which reported to the President who increased or decreased the duty accordingly. The Court in sustaining that system said, "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*, at 409.

Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.

The phrase "value to the recipient" is, we believe,

the measure of the authorized fee. The words "public policy or interest served, and other pertinent facts" would not seem relevant to the present case, whatever may be their ultimate reach. The backbone of CATV is individual enterprise and ingenuity, not governmental largesse. The regulatory regime placed by Congress and the courts over CATV was not designed to make entrepreneurs rich but to serve the public interest by "mak-[ing] available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service." 48 Stat. 1064, as amended, 47 U. S. C. § 151.

While those who operate CATV's may receive special benefits, we cannot be sure that the Commission used the correct standard in setting the fee. It is not enough to figure the total cost (direct and indirect) to the Commission for operating a CATV unit of supervision and then to contrive a formula that reimburses the Commission for that amount. Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume. The philosophy of § 483a was stated by Congressman Sidney Yates of the House Committee on Appropriations. While he spoke of TV and radio broadcasters, what he said is germane to the CATV problem:

> "I think it is only fair that in exchange for the franchise that the Government gives the broadcasting company and the protection which the Government affords to such broadcasting company to assure its freedom from interference in the operation of its broadcasting facilities in the particular point of the spectrum which it occupies, . . . it should pay some of the costs of the hearings. It is perfectly proper that the franchised company make a profit, and there has been much profit mak-

ing. Such companies should assume a greater share of the costs, because regulation is necesary." 97 Cong. Rec. 4809.

That congressional aim can be achieved within the framework of "value to the recipient" as contrasted to the public policy or interest that is also served.

The result is that we reverse the Court of Appeals so that the case can be remanded to the Federal Communications Commission for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the decision of this case.

[For dissenting opinion of MR. JUSTICE MARSHALL, see *post*, p. 352.]